AN

INQUIRY

INTO THE PROPRIETY AND MEANS

OF

CONSOLIDATING AND DIGESTING

THE

LAWS OF PENNSYLVANIA.

BY

THOMAS F. GORDON.

PHILADELPHIA:

PHILIP H. NICKLIN, LAW BOOKSELLER.

1827.

PREFACE.

The spirit of improvement which of late years has been beneficially engaged upon the arts and sciences generally, has at length applied itself to the systematizing and amelioration of the law. The conviction daily becomes wider and deeper, that it is possible to make this first and most necessary of the sciences, more simple, more comprehensible, and consequently better adapted to the ends of its institution. In most countries deriving their jurisprudence from English sources, a rational desire of investigation has been awakened, and is taking place, of that blind admiration hitherto prevalent which discouraged every attempt at innovation. In England itself, the work of reformation in relation both to the principles and the forms of the law, has been commenced under the auspices of the government, and appearances indicate the approach of extensive and beneficial changes. In Pennsylvania, our legislators have been employed, from time to time, since the foundation of the colony, in moulding a system proper to our situation; and we may now claim a Pennsylvania system of juridical principles, requiring only proper exposition to be understood and admired.

The great faults of English jurisprudence are complexity, obscurity and uncertainty. The legislation of our own country has not been adapted to remove these evils: our law-givers in pursuing, perhaps, in many respects the wiser course, of partial alteration, when and where the propriety

of such alteration became apparent, have unavoidably increased them,—by suffering the old and the new law to continue intimately blended, and by their adherence to the ancient style of legislation. Hence our system is almost buried beneath the rubbish of the old English laws, and the refuse of other materials from which it has been formed; and the necessity daily becomes more imperative to exhibit it in all its beauty, strength and harmony.

With a view to this object the following pages have been written. They contain a brief effort to portray that perplexing obscurity and uncertainty of the law, which renders it a mystery to its ablest professors—to expose the sources whence those evils arise, and to suggest the proper remedy. The course of our inquiry necessarily led to a frank investigation of the exercise of the legislative and judicial powers. For the legislature and the judiciary we have a profound veneration; to have spoken disrespectfully of either, would have been a violation of our principles,—but regardless of the individuals who compose them, we have considered them as abstract personifications, and have fearlessly expressed our opinions on the manner in which they have exercised their powers.

If our labours shall serve to quicken the spirit of reform, now awakened, or shall aid to mark out its course, we shall find a reward in the consciousness of having served the republic.

AN

INQUIRY

INTO THE PROPRIETY AND MEANS

OF

CONSOLIDATING AND DIGESTING

THE LAWS OF PENNSYLVANIA.

Law, in the sense in which we are about to consider it, is a rule of civil conduct prescribed by the supreme power of the state. The prescription, which forms a substantive part of this definition, implies two very important particulars; *certainty* in the rule, and *cognoscibility*, or aptitude of being known. For, in vain is a rule said to be prescribed, whilst its existence is in doubt among those versed in the law, or whilst it is discoverable only by great labour and much research.

The first duty of the legislative power, is to prescribe necessary rules for the government of society, and the promotion of the happiness of individuals. The next, and that not of inferior obligation, is so to frame and publish such rules, that those who are to obey may know and comprehend them.

The laws which establish and govern public relations, define and punish crimes, and determine the rights of persons and of property, are presumed to be known in all their amplitude to every citizen. This, however, is one of many legal fictions. But every citizen should be enabled to obtain such knowledge without extraordinary labour or great expense. If his inability arise from the complex and loose manner in which the laws are framed, or from the multitude of scarce volumes over which they are spread, the fault rests with the legislative power, which has failed to perform an essential part of its duty, by not prescribing the law in a public and conspicuous manner. We justly condemn the tyranny of Caligula, "who wrote his laws in a very small character, and

hung them on high pillars, the more effectually to ensnare the people." But are not modern legislators obnoxious to the like judgment, if, when aided by the mighty power of the press, and the general diffusion of letters by which every individual may be instructed in the rules preseribed by his government, they so manage legislation, that, in a vast number of cases, it is utterly impossible for the uninitiated in legal seience, and a diffieult and uneertain labour for the lawyer and the judge, to ascertain the law.

In a government of laws, to every people proteeted against the eapriee of despotie power, a ready aceess to a knowledge of the law is an inestimable blessing; for it is the only means by whieh all that is valuable in social life may be preserved. The people have ever thus eonsidered it. They have paid more heartfelt respect, more profound veneration to the memory of their law-givers, whether like Solon, Lycurgus, Numa, Alfred and Penn, they were founders of codes, or like Theodosius, Justinian, Edward the eonfessor, and Napoleon, they merely restored them; than to the eonqueror, whose mighty arms grasped the ends of the earth. Napoleon, the conqueror, was overwhelmed on the plain of Waterloo by the eurses of every nation of Europe. But "Law-givers," says Lord Bacon, "are still kings and rulers after their decease, in their laws;" and the memory of Napoleon, the legislator, will be for ever cherished. The nations which resisted his arms, are destined to be governed by laws of his imposition.

It can scaree be necessary to particularize the benefits which necessarily flow from ready access to a knowledge of the law. The people from self-love, if not from higher motives, are disposed to obey its mandates. If the law be wise, and the means to know it be given to them, their peace and prosperity must be assured. Deeply impressed therefore with the importanee of these truths, we proceed to inquire: first, what is the state of the law of Pennsylvania in rélation to its certainty and eognoscibility; and, secondly, by what means these desirable qualities may be given or improved.

The law of Pennsylvania eonsists of the Constitutions, the Statutes, and the Common law. We will treat these in the order we have placed them, that being their proper and subordinate one.

I. The constitutions of the United States, and of the State, form the Supreme law; the latter, however, is subordinate to the former, and if it contain provisions opposed thereto, must give way. The Statute and the Common law, when in eontravention of these

fundamental laws, are void. As the constitution of the United States has created a government unique in its character, so the care and deliberation with which it was framed are unparalleled. The high and important interests which it involves demanded the greatest perspicuity in its provisions; and such has been the success of its framers, that no patent ambiguity, it is believed, exists in the instrument. Beside the care of the general convention of the United States, it received the most careful scrutiny from thirteen state conventions; and the amendments which have been made to it, consisting principally of supplementary articles, have been weighed carefully by congress and the legislatures of at least two-thirds of the states existing at the time of their adoption. The constitution of Pennsylvania was modelled on that of the United States; its framers having the benefit of the discussion of those political principles, which grew out of the investigations of the constitution of the general government. Thus elaborated, these instruments present us laws, as certain and intelligible as the imperfection of language permits. They are comprehensible by every capacity, and are so published that every citizen may know them.

II. The Statute law, is that which is enacted by the legislative power created by the constitution. The most obvious and striking difference between the constitutional and statutary law consists in their phraseology. The framers of the former, justly believing that perspicuity is best attained by the use of that style in which the people are accustomed to communicate their most abstract, as well as familiar ideas, have employed one simple and lucid, and, therefore, nervous, which carries their meaning to the understanding, as forcibly as that used for the tables written upon Mount Sinai. A style so appropriate adopted for laws on which the political and civil fabric is founded, would seem to be fitted for subjects of minor importance.—Yet one of a very different character prevails. It is incontrovertible, that of all literary works, the statute book is the most incomprehensible. Its style is diffuse, loose, and verbose, producing necessarily great obscurity of the sense. And, as if the legislator laboured to confound rather than to enlighten, he frequently groups into the same section, and sometimes into the same sentence, several distinct propositions, offering to the understanding a confused picture which requires time and labour to analyse; producing no small portion of the perplexities and delay, the just reproach of our jurisprudence.

The proper style for the law is that, which Quintilian assigns for a discourse: "It should be obvious to the most careless and negligent hearer, so that the sense shall strike his mind, as the light of the sun does our eyes, though they are not directed upwards to it. We must study not only that every hearer may understand us, but that it shall be impossible for him not to understand us."

How widely the phraseology of the statutes differs from that prescribed by the above rule, will be discerned from a few instances taken from the statute book at random. Section I. of the Act of 29th of September, 1790, entitled an Act for the regulation of apprentices within this commonwealth, provides, "That all and every person or persons, that shall be bound by indenture, to serve as an apprentice in any art, mystery, occupation or labour, with the assent of his or her parent, guardian or next friend, or with the assent of the overseers of the poor and approbation of any two justices, although such persons, or any of them, were or shall be within the age of twenty-one years, at the time of making their several indentures, shall be bound to serve the time in their respective indentures contained, so as such time or term of years of such apprentice, if a female, do expire at or before the age of eighteen years, and if a male, at or before the age of twenty-one years, as fully to all intents and purposes, as if the same apprentices were of full age at the time of making the said indentures, any law, usage or customs to the contrary notwithstanding." This section, which first struck our eyes on opening the volume, is more than ordinarily free from faults of composition. The unity of object is well preserved, but it abounds with verbal redundancies. It contains one hundred and sixty-one words, of which more than half are unnecessary to the sense, and serve, therefore, but to cloud it. The following substitute, it is presumed, contains the full sense of the section.

"A minor may bind him or herself by indenture to serve as an apprentice in any art, mystery, occupation or labour, with the assent of his or her parent, guardian, or next friend; or of the overseers of the poor, and approbation of two justices, provided the time of service of such apprentice, if a female, shall expire at or before the age of eighteen, and if a male, at or before the age of twenty-one years."

The next instance we shall present is the first section of the Act of 24 March 1818, which enacts that, "In all cases where any person or persons have heretofore made or executed any vol-

untary assignment of his, her or their estate, real, personal or mixed, or any part thereof, to any person or persons in trust for the use of his, her or their creditors; it shall and may be lawful for the court of common pleas of the proper county, and they are hereby authorised and required on the application of any of the creditors of such assignor, at any time after two years from the time such assignment shall have been made, to issue a citation to such assignee or assignees, commanding him, her or them, to appear at a time to be appointed by the court, and settle his, her or their account, exhibiting a statement of the amount of the estate thus assigned to him, her or them, and the manner he, she or they, have disposed of the same, which account shall be exhibited on oath or affirmation as aforesaid; and the said assignee or assignees, shall be compelled to answer, on oath or affirmation, all interrogatories which shall be exhibited to him, her or them, in open court, on the examination of his, her or their accounts; and the court shall have power to decree a distribution of the proceeds of such estate, agreeably to the intention of such assignment, after allowing such assignee or assignees, such pay or commission, for his, her or their trouble and services, as the said court, in their discretion, may think reasonable."

This section has five distinct objects, all of which are embraced in one long period of two hundred and eighty-seven words. 1. To give jurisdiction to the courts of common pleas, in case of assignees of insolvent debtors. 2. To direct the manner in which the accounts of such assignees shall be stated. 3. To compel the assignees to answer, on oath, all questions relating to their trust. 4. To empower the court to make distribution of the estate assigned; and 5. To allow compensation to the assignees. How practicable it is, to convey the provisions of this section with greater clearness, and in shorter compass, will be apparent from the following substitute.

"Where any person has made, or shall make, a voluntary assignment of the whole, or any part, of his estate in trust for the use of his creditors, the Court of Common Pleas, of the proper county, shall, on the application of any such creditors, at any time after two years from the making of such assignment, issue a citation to the assignee, commanding him to appear at a time to be appointed by the Court, and settle his accounts. And such assignee shall then and there, on oath or affirmation, exhibit a statement of the amount of the estate thus assigned, and of the manner he shall have disposed thereof, and shall answer

all interrogatories exhibited to him in open court, on the examination of such account. And the court, after allowing to the assignee a reasonable compensation for his services, shall distribute the proceeds of such estate, pursuant to the intention of such assignment."

In speaking of the assignor and assignee in this substitute, the masculine gender and singular number are used. But, as in common parlance, these are words designating character, comprehending both genders and numbers, no judge would hesitate to enforce the law, where the assignor or assignee was a female, or the assignment was made by more than one person to several persons.

We might thus proceed with almost every page of the statute book, reducing its contents at least one-third, improving its intelligibility, and not take away a single rule which the legislature intended to prescribe. The extent to which the consolidation of the law may be usefully carried, has been strongly shown by Mr. Espinasse, in his letter to the members of the new parliament, page 12, in note. "Any attempt," says he, "at amendment in the law respecting the settlement of the poor, and the subjects connected with it, have been almost abandoned as desperate. The matter appeared to me in another light. I could not avoid feeling the inconvenience of referring to so many decided cases, in which the distinctions are very refined, and their length inordinate, to enable me to come to a settled opinion on any question. I thought it would be practicable to do away these distinctions by a positive enactment on each head. With this view I undertook the task, and reduced the law of settlement extending in Burns to 348 pages, into the compass of 24, which I have by me."

By the substitution of a plain and simple style, such as has been adopted in the constitutions of the United States and the several states, and in the articles for the government of the army and navy of the United States, it will not be necessary to change the operative words of the law, whilst relieving it from that involution, complexity, and profusion of words which now overwhelm its sense. It is evident from the examples above given, that the ordinary language of the statutes, does not possess any redeeming perspicuity or simplicity, any virtue that compensates for its clumsiness: on the contrary, what is plain enough when expressed in the speech of common life, loses all its clearness when transfused into that of the statutes.

Grievous as is the fardel of senseless phrases, so destructive of those desirable qualities of the law, certainty and cognoscibility, it is among the minor evils in regard to legislation, of which the citizen has cause to complain. Had he no other difficulty to encounter, in seeking to ascertain the law, he might submit patiently to the labour necessary to separate provisions improperly interlaced, and strip them of the verbiage under which their sense is hidden. But after having broken and stripped away the husk and obtained the kernel, he is doubtful, if it be that which he sought, whether a subsequent statute have not changed or repealed the law. If he proceed carefully to examine whether subsequent statutes have been passed, (which he may with some readiness but not with certainty do, by consulting the indices to the statutes,) and he find no reference to other statutes, he may with some confidence infer, that the statute as he finds it on the face of the statute book, is the law of the land, always excepting such modifications as it may have received by judicial construction. But of this he has no certainty, since it may have been repealed or modified by some act, which having no analogy whatever to the subject of such statute, as indicated by its title and the mass of its contents, may have been overlooked when the index was framed. But should the inquirer discover that the subject of his inquiry has been frequently legislated upon, he is compelled to enter an almost inextricable maze. If he have recourse to the statutes at large, he must search at least the indices to Smith's and Reed's editions, and to the pamphlet laws published since Mr. Reed's two volumes. If he turn to Purdon's Digest, last edition, his labours will perhaps be shortened. Let us then take up this work, and endeavour to ascertain the law upon one or two subjects, and mark the time and labour necessary for the purpose. One of the early titles of the work is "Auctions." Under that title we find the act of 23d September 1780, comprising seven sections. Now let us see how much of these is entitled to a place among the laws of the land.

The first section directs that the President or Vice-President in council, may appoint and license three auctioneers, &c. to continue during the will of such President and council; to give bond to President, &c. in the sum of twenty thousand dollars, conditioned, &c.

Of these provisions one only, and that one greatly modified, is now in force. More than thirty-six years have elapsed since the Presidency, Vice-Presidency, and Executive Council have been abo-

lished. The number of auctioneers is now unlimited—their tenure of office is during good behaviour, and payment of the sums required by law—the bond is to the Governor alone, in a much smaller sum than twenty thousand dollars.

The third section specifies what things auctioneers may sell—directs a duty of one per cent. to be paid to the state, on all sales including lands, ships, and furniture of every description—commands that auctioneers shall render accounts and pay duties, under penalty of dismission for nonperformance—imposes a penalty on selling by auction without authority, and directs the manner of its recovery. The 4th section exempts from the prohibition to sell at auction, executors, sheriffs, constables, &c. The 5th, 6th, and 7th sections, prescribe the registry of horses exposed to sale by auction, and that the right of property in them shall not be changed by such sale. In these provisions, the following changes have been made. The duty on the sale of real estate, on household furniture and wearing apparel which have been in use, and on vessels belonging to citizens, has been abolished. The mode of settling auctioneer's accounts has also been changed, and all the others have been supplied by subsequent acts.

The act of 23d September 1780, though holding a place in the latest edition of the statutes, serves no other purpose than to mislead the inquirer. To obtain correct information, he must consult the following acts, viz. 13th April, 1782—9th December, 1783—19t. March, 1789—27th March, 1790—10th April, 1790—26th Febru[illegible], 1791—25th January, 1816—14th January, 1817—2d April, 182[illegible]—29th March, 1824, all of which change the law by adding new or modifying the old provisions. The repeal of former provisions is not made by specially enumerating them, but in terms such as these: "So much of any former act or acts, as is inconsistent with this act, is hereby repealed." Former acts are confirmed after the manner of the 10th section of the act of April 1822, which new modelled the auction system, thus: "All and every act or acts of the General Assembly of this Commonwealth now in force, respecting any auction or auction duties, or person or persons using or exercising the business of an auctioneer, within two miles of the State-house in the city of Philadelphia, and all the rules and regulations, provisions and directions, pains and penalties contained in the said act or acts, not inconsistent with nor repealed by the present act, shall continue in force, and be applied as fully and effectually to the auctioneers to be com-

missioned in virtue of this act, as to those appointed and commissioned under such former act or acts." In order therefore to ascertain the law relating to the auction system, it is indispensably necessary to consult every act which has been passed on the subject, whether obsolete or repealed. These acts occupy eleven closely printed octavo pages, but the law in force might be included in three such pages. It would be erroneous to say that the law on this subject cannot be discovered—but the discovery must be preceded by laborious research, such as few persons have time, or are competent to give.

Another instance of the perplexity and uncertainty arising from the practice of heaping statutes upon each other, will be found in the subject of tavern licences. We select this because it is familiar to many, and does not occupy much of our room. Any person desirous to ascertain the policy of the state in relation to houses of public entertainment, will probably have recourse to Purdon's Digest. He will learn from the act of 1700, that no one is permitted to keep such house, unless he have been recommended to the Governor, by the justices of the proper County Court for his license: That certain misdemeanours of the person so licensed, are punished by fine and forfeiture of his license: That the keeping of such a house without license, is punishable by a fine of five pounds: That a sum is paid for such a license, graduated according to the locality of the house for which it is obtained, and the kind of liquors sold: That a certain fee is payable to the Secretary of the Commonwealth for drawing such license. But having learned this, let not the inquirer suppose that he has learned aught of the subject of licences. On further search he will discover, that recommendations are not made by the Court to the Governor, nor licences granted by him; but that the Court of Quarter Sessions are empowered to grant such licences; that the penalty on selling liquors without licence, has been greatly increased; that the rates of such licences have been doubled; and that the Clerk of the Court, not the Secretary of the Commonwealth, draws and is paid for drawing such license. Why then, it will be asked, has this statute been preserved in every edition of the laws? Simply, because there are two short sentences in it which remain unchanged—because the garment, though repaired until scarce a vestige of its original composition remains, still has that vestige.

Still further to exemplify the intricacy of the statute law, we request the reader to make an effort to ascertain the powers and

duties of the Auditor and State Treasurer. Many of their powers and duties are set forth in the act of 30th March 1811; but for others, he will have the following directions given by the 49th section of that act. "All the duties not herein provided for, which previous to the passage of the act entitled, 'An act making a new arrangement of the Treasury department, and enjoining certain duties on County Commissioners,' were enjoined on the Comptroller General, shall be performed by the State Treasurer, and those enjoined on the Register General, shall be performed by the Auditor General, under the same powers and subject to the like restrictions and proceedings, as when performed by the said Comptroller and Register Generals." Now, the first step in pursuing the inquiry pointed out by this section, will be to ascertain, when the "act making a new arrangement, &c." was passed; and then, to search for all the acts prior to that time, which relate to the duties of the Comptroller and Register Generals—officers who have ceased to exist for many years. Purdon's Digest, the book commonly resorted to, affords no information; recourse must therefore be had to the statutes at large, tracing them backwards from 1811. All the acts relating to the Comptroller and Register Generals must be collected and compared, and these we think reach at least to an hundred, and from the duties created by them, are to be taken the duties enjoined on the Auditor and Treasurer Generals by the act of 30th March 1811, and the remainder will be the duties enjoined on these officers by the 49th section of that act. But this being done, the inquirer will not have arrived at a full knowledge of their duties. Section 48th of the last mentioned act declares, that the State Treasurer shall continue to possess and exercise all the powers and duties, vested in him by the 9th section of the act of April 1st 1790, entitled "An act to enforce the due collection of the revenue of the state and for other purposes therein mentioned," which are necessary in recovering the balances due to the Commonwealth on account of the loans made under the acts of February 26th 1773, and April 4th 1785. Having by reference to these acts ascertained what these duties are, by extending his researches he may discover that none of them appertain to the Treasurer, but have been transferred by the act of 1819, to the Auditor General; and that certain powers given to the Treasurer by the 10th section of the act of 30th March 1811, have also been transferred to the Auditor General.

These difficulties serve to obscure one of the most important

departments of the government. We think it probable, that the treasury officers themselves, and such members of the legislature as have seated themselves on the treasury chest, and have studied every avenue by which it may be approached, may know the duties of such officers; but we feel quite certain that no other individual, who has not been specially excited to the task, has acquired this knowledge.

We would further invite our inquirer, to seek for a knowledge of the law, constituting and regulating the judicial power—to state how the Supreme Court is constituted—what are the boundaries of judicial districts—and what the powers given specially by statute to the judges. To do this he will have to consult seventy-seven acts of assembly, as collected and chronologically arranged by Mr. Purdon. If he betake himself to the statutes at large, he may labour industriously, but he will need also the aid of Hercules. Let us examine, for a moment, the progress of our legislation, on this most important subject, and see what must be the necessary uncertainty of the law,—what the difficulty to obtain a knowledge of it.

As the substratum of our judiciary system, Mr. Purdon has given eleven sections of the act of 22nd of May, 1722, enacted more than half a century before the declaration of independence, and sixty-eight years before the adoption of the present constitution. The 11th section directs, that "there shall be three persons of known integrity and ability, commissionated by the governor, or his lieutenant, for the time being, by several distinct patents or commissions, under the great seal of this province." We have next the act of 20th May, 1767, entitled "an act, to amend an act for establishing courts of judicature within this province," then "a supplement to the act for establishing courts of judicature in this province," next the act of 25th September, 1786, entitled "an act for the more speedy and effectual administration of justice." Within a few months after the passage of this act, say 28th February, 1787, we have "a supplement to the act, entitled an act for the more speedy and effectual administration of justice." On the 13th April, 1791, was passed, the act entitled, "an act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the constitution." And on the 30th September, in the same year, a supplement to the last preceding act, was enacted; and, on the 18th April, 1795, "an act supplementary to the several acts of assembly, for establishing the judicial courts of this commonwealth,

in conformity to the alterations and amendments in the constitution." And on the 24th February, 1806, we have "an act to alter the judiciary system of this commonwealth," the last section of which, makes the following most compendious repeal. "All acts of assembly now in force, so far as they are inconsistent with this act, and no further, are hereby repealed." We have heard much complaint, of the generality, the uncertainty, the trouble, and vexation which arise from repealing clauses limited thus, "all the provisions of certain acts, (specifying them,) so far as they are inconsistent with this act, are hereby repealed." But the research imposed by the latter, compared with that imposed by the former repealing clause, is the circumnavigation of the globe, compared with the passage of the Delaware. We might continue to heap amendment and supplement upon each other, down to the present day; but we are sure the reader is prepared to cry, hold! enough. All these acts, original, supplementary and emendatory, are to be consulted, in order to obtain a knowledge of our judiciary system, and this labour is to be undergone, even to be assured of any one point.

We ask now, whether such a state of the law is adapted to the welfare of the people? If the evils we have exposed, pertained solely to the cases we have exhibited, they would be a humiliating stain upon rational jurisprudence. But prevailing as they do, in every title of the law, in proportion as it has been legislated upon, we can account for the endurance of the people, only on their faith and hope, that at length the legislature would attain the long sought deliverance.

The evils which we charge upon our statute law, prevail in the statutes of every state in the Union deriving its law from England, and they abound in the United Kingdoms. Mr. Isaac Espinasse, a barrister of law, a distinguished law reporter and writer, and an acting magistrate, has addressed the new Parliament of Great Britain, with a view to the emendation of the statutes. We take leave to present the reader with a few extracts from his complaint.

"The preambles of all the modern statutes," says he, "almost without exception, are fraught with the soundest observations and good sense, and appear to proceed from the wisest views of the state of society. But in the enacting part, very many will be found to fall very far short of attaining that, which, from the preamble, we were led to expect. Among these striking defects, will be found

great inattention to perspicuity of language and arrangement, which creates considerable difficulty of understanding them; and in very many a total neglect of sufficient means of enforcing them, even when they are intelligible. It is a matter of curious observation, to compare the enactments of the ancient statutes of Westminster, Merton, or Marlbridge, with the modern ones. In the former the clauses are short, but given in language admirably clear and comprehensive; while most of the latter are loadened with words, disfigured with repetitions, and not a clause scarcely is to be found without the embellishment of a parenthesis or a proviso. The difficulty of forming a satisfactory construction on them, defeats all power of carrying them into effect; and the promise which the preamble held out ends in nothing."

The difference in the style employed in the old and new statutes, is not greater in England than in the United States. At the close of the revolutionary war, and at the period of consolidating the general and state governments, the energetic spirit which had borne us triumphantly o'er the field, displayed itself in our legislative halls, and dictated laws in a style shorter, clearer, and more terse, than that at present used. Speaking of the mode of amending laws, Mr. Espinasse proceeds:

"The new act selects particular clauses of the former ones, or parts or fragments of them, which appear to be exceptionable, and which should therefore be expunged from the statute book, and enacts, '*That so much of such an act,*' or '*so much of such a clause as respects such a matter, should be repealed,*' and then enacts certain provisions in lieu of those repealed; or adds such as are deemed necessary to amend them. By this means a patched and piece-meal statute is passed, upon which no accurate construction can be put, without consideration of all those from which such *excerpta quædam* have been taken, and without consulting and referring to them all."

This is the voice of an acting magistrate more than ordinarily well qualified for his office; and we do not doubt that it will be echoed by every judge and justice in this country.

We may add here with propriety, a passage from the report of a Committee of Parliament, made 1791; remarking, that every particular of the passage is as true applied to the statutes of Pennsylvania, as to those of England.

"Your committee cannot but observe the matter of it [the statute law,) to be in many places *discordant*, in other places obso-

lete, in others perplexed by its *miscellaneous* composition of incongruities; and *that its style is, for the most part, verbose, tautologous, and obscure;* all which circumstances seem to have engrossed the attention of Parliament at successive periods, but not to have produced any improvement in the degree which their importance demands."

There is yet one species of statute or written law to be noticed, which has all the faults enumerated, and others more grievous, if that be possible. We allude to the statute laws of England in force in this country. These are of two kinds, such as existed anteriorly to the settling of the province, and such as were adopted here subsequent thereto, and prior to the revolution. They owe their force in this country more to common law principles, than to the authority of the legislature. We do not pause here to consider the nature of that power by which these laws were introduced—of that power which is not legislative, but which can make laws affecting life, liberty, and property—we shall speak of that hereafter. The English statutes were applied in this country at all times, under the condition that they were adapted to its situation; and as the situation of the country was in the course of constant mutation, many of these statutes were not in force at one period, which, by mere lapse of time, obtained authority at another. But as it often happened that the whole of an act of Parliament was not applicable to this country, parts of acts, and frequently parts of sections, only could be in force. Whether any part of a particular act, and if any, what part of such act entered into Pennsylvania law, was ever an indeterminable question by the people or the bar. The decision of a court gave effect, *pro hac vice* at least, to so much of a statute as was declared relevant to the case decided, *but to no more.* Hence, the law derived from English statutes before the revolution, was, to a very great extent indeed, uncertain and unknowable. That most comprehensive act of legislation, the act of 28th January, 1727, which gave to the state the whole of its code, after it had been seven months entirely without municipal law, did nothing to render such statutes more certain or more cognoscible. By the second section of that act, the people are commanded to yield obedience to the Common law, and such of the Statutes of England, as had theretofore been of force in the province. But the third section introduced a new principle for determining the applicability of the Common and Statute law of England to this country; declaring, that so much of every law as commands any thing incon-

sistent with the constitution of the commonwealth to be void. Consequently, to determine what portion of an English statute was in force, it became necessary for the citizens; first, to determine whether it was applicable to our situation; and secondly, whether it was consistent with our constitution. The impracticability of this labour will appear in another part of this inquiry.

The evils then of the existing state of the Statute law, may be stated to consist, 1. In the STYLE—which by reason of verbal redundancies—involution of sentences—and heterogeneous combinations, renders the law obscure and difficult to be apprehended.

2. The mode of amendment and alteration—which, by partial repeals, and the introduction of new, without the express abrogation of the old provisions, however inconsistent, loads the Statute book with obsolete and repealed laws, intermingled with the living and operative—confounding ordinary efforts to ascertain the existing rule.

3. And in the case of the English statutes the want of sufficient publication.

III. The Common Law, forms the greatest, if not the most important part of our laws. It is the subject of frequent and high eulogium, by its professors. In a country deriving its jurisprudence from England, it is heresy to doubt its superiority above all other systems. In common with our brethren who have their notions of jurisprudence from English sources, we have had a horror of the civil law, and have entertained the most profound respect for those venerable customs, which have their roots in times that preceded English history, and were planted by semi-barbarians, qualified only by their ignorance of other countries, and of every form of life save their own, to lay the foundations of a system for the government of society, so multiform and sophisticated as that of the present civilized world. We must, however, confess, that our veneration was greatest, as is but too commonly the case, when our ignorance was most. Having almost completed the "*viginti annorum lucubrationes*," which Fortescue requires to understand the Common law, we have gained a position, from which, though unable to view all its extent, we can discover faults, as well as beauties.

The Common law, to speak soberly of it, has much that should be cherished with the greatest care and vigilance; much that renders it greatly superior, if not in its abstract rules, yet certainly in its mode of administration, to the civil law; but as a system, it is

not the perfection of human reason, though claiming to be animated and informed by that principle. It has faults in principle and practice, which the greater experience, and if experience be the parent of wisdom, we may justly presume the greater wisdom of the legislators of the present day may correct. But what is the Common Law?

We have said, that the Statute law is that, which is enacted by the legislative power created by the constitution. If the Common law be not of that character, it must proceed from a legislative power, not created by the constitution. But as there exists no power under the constitution which can rightfully impose a law, other than the general Assembly of the commonwealth, the Common law must be sanctioned by them, or must be of no validity. This sanction was given by the Act of March, 1777. Whatever authority the Common law may have had from other sources, prior to the revolution, that event in the public estimation suspended all municipal laws—which were restored by the Act of 1777. Still the Common law is not, like the Statute, the naturally begotten offspring of the legislative power, but is rather to be considered as a child adopted at full age, with its faculties matured, and its vices in full vigour. What then is the Common law? It is more easy to describe than to define it. From the description given by Justice Blackstone, borrowed chiefly from Sir Matthew Hale, we may venture to define the Common law, to be that law which has been sanctioned by long usage, and the approbation of the judges. Long usage alone will not make the law; the highest court of judicature, must pass on the reasonableness of such usage, and may deny the validity of the rule attempted to be drawn from it; but may not legally without such usage promulge any rule. Such is the theory as to the power of the judges; how inconsistent the practice is with the theory, every reader of reports can tell.

Having said that the Common law is in force here, by virtue of the Statute of March, 1777, it is important to ascertain the sense of the legislature, as to the nature and extent of the Common law. Perhaps there never was a more important, a more comprehensive statute enacted, than that which resuscitated the whole body of pre-existent law. It was passed under the spur of necessity, which urged to speed, and denied time for deliberation. Amid the din of arms, and mighty political convulsions, when life, liberty and property, were threatened from without, men were glad to

avail themselves of any system of rules, ready made to their hands, which might protect them against internal violence and irregularity. Under circumstances more favourable, it is extremely probable, that the Common law would have been thoroughly purged of its crudities, and reduced to a form more congenial with the institutions of the country and the character of the age—perhaps the constitution of 1776, might have contained a provision similar to that in the constitution of Louisiana, forbidding the legislature "to adopt any system or code of laws, by general reference to the said system or code," but in all cases requiring it to specify the several provisions of the laws it may enact, in which case, more certainty with regard to the law would have ensued. The words of the Act of March, 1777, relating to this subject, are "all and every person and persons whomsoever, are hereby enjoined and required to yield obedience to the said Statute laws, as the case may require, until the said laws or acts of general Assembly, respectively, shall be repealed or altered, or until they expire by their own limitation: and the Common law, and such of the Statute laws of England, *as have heretofore been in force* in the said province, except as hereafter excepted." What is the true construction and effect of the words, "*have heretofore been in force?*" The Common law comprehends, not only a system of rules, but a power to enact such rules. Its most peculiar and much lauded principle consists in its perpetual vigour and activity; in its plastic and lambent nature, embracing every species of human action, giving a remedy for every injury, prescribing a punishment for every offence, and which, changing with the mutations of society, adapts itself to every occasion. Did the legislature understand the Common law, in this sense, at the passage of the act of 1777, or did they mean to adopt such rules only as had been declared and acted upon, prior to that act? If the latter, then every rule of law not authorised by the constitutions or statutes, that has been established by our courts since 1777, is void, and the courts have, thereby, infracted the constitution; if the former, the legislature has created a new and co-ordinate legislative power, the legitimate existence of which, under the constitution, may well be questioned. We incline to believe, from the labours of the judiciary, and the acquiescence of the general Assembly, that the Common law, as a power, was recognized by the act of 1777, and that the rules settled before the revolution were restored,

and a power given to the judiciary, if constitutionally it can be given, to create and re-model the law to an uncertain and undefined extent.

We well know, that all legislative power, *eo nomine*, is repudiated by the courts, and denied to them by the common law writers; and it becomes our duty to show, that this modesty of pretension is outstript by practice; and that the very tongues and pens, which deny, do also affirm the right. We shall be considered as treating this subject fairly, by using the words of the great commentator on the Common law, who speaks the language of preceding writers, and has transmitted their sense to thousands. "It is an established rule," says he, "to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every judge's opinion, as, also, because the law in that case being solemnly declared and determined, what *before was uncertain, and perhaps indifferent, is now become a permanent rule*, which it is not in the breast of any subsequent judge to alter or vary from, according to his privy sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and explain the old one. *Yet this rule admits of exception*, where the former determination is most evidently contrary to reason, much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that it is not the established custom of the realm, as has been erroneously determined. And hence it is, that our lawyers are, with justice, so copious, in their encomiums on the reason of the Common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law, can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded." Professor Christian in a note on this passage remarks, "But it cannot be dissembled, that both in our law, and in all other laws, there are decisions drawn from established principles and maxims,

which are good law, though such decisions may be both manifestly absurd and unjust. But notwithstanding this, they must be religiously adhered to, by the judges, in all courts, who are not to assume the character of legislators. It is their province *jus dicere*, and not *jus dare*. Lord Coke in his enthusiastic fondness for the Common law goes further than the learned commentator; he lays down that *argumentum ab inconvenienti plurimum valet in lege*, because, *nihil quod est inconveniens est licitum.*" This position is, however, contradicted by Mr. Hargrave.

Adherence to precedent is the proper duty of a judge. He thus performs the office which the constitution and law assign him. He declares but does not make the law. But what is he who makes the precedent? A legal precedent we understand to be the first declaration of a rule of law, or its first application to a new class of cases. Shall we be told that this is the declaration and not the making of the rule? This substitution of phrase does not change the matter. If the rule was before declared, the judge who reiterates it, does but proclaim the law anew; but if it have not been before declared, it has never been prescribed, and therefore was not law until such declaration. But the learned commentator does not leave us in doubt, as to the character of the precedent. "It solemnly declares and determines what before was uncertain, and perhaps indifferent, and becomes a permanent rule." What more, we ask, does the most plenary legislative power effect, than to declare that certain, which was before uncertain, and that illegal which was before indifferent? For all practical purposes an unknown law has no existence, for it is wholly inapplicable as a rule of conduct. Yet the applicability of this unknown law, in the determination of new cases, is claimed by the most eminent lawyers, as a quality which renders the Common law superior to all others. Lord Mansfield when at the bar, is reported to have thus expressed himself: "Cases of law depend upon occasions which give rise to them. All occasions do not rise at once, a statute very seldom can take in all cases; therefore the Common law, that works itself pure, by rules drawn from the fountains of justice, is superior to an act of parliament."

But again, the course by which the judges determine the rule at the first application, is that of the legislator preparatory to the enactment of the law. When the facts of the case are submitted, the judge does not immediately apply to them an established and known rule. He frequently professes himself unqualified instantly

to decide. He requires to be enlightened. He asks to hear and compare—to examine and reason, and be assisted by the arguments of others, before he pronounces what the law is, or rather what it shall be. If the rule of law applicable to the case really existed, it should be as readily discernable, as that English canon of descent which prohibits a fee lineally to ascend, or to pass to one not of the blood of the first purchaser.

One other authority may suffice for the present, to show the legislative character of the Common law; and that this power is at work even in foreign countries, to make laws for us—to show that our dependance upon this unwritten law, is a chain to bind us to the car of England, and to prevent the proper exercise of our own growing strength. We shall give the authority, in the words of the note to Dr. Duponceau's Dissertation on the Jurisdiction of the Courts of the United States, page 121.

"There is no maxim better established in English jurisprudence, and indeed, in that of all the world, than that the judges are not to make the law, but to expound it, and that they are by no means to substitute for it, their own ideas of right and wrong. But here is a very strong instance to the contrary. The law had been settled in England in the case of the African Company *v.* Bull, (1 Shower, 132—Gilb. 238.) and the custom, says the reporter, had been proved plainly and fully by *all the exchange;* that the first underwriters, in a case of over insurance, were to pay the loss to the extent of their policy, and the others successively, until the whole loss was satisfied. Yet Lord Mansfield, yielding to a sudden notion of superior equity, in two successive cases at Nisi Prius, *Rogers* v. *Davis*, and *Davis v. Gilbert*, (Beawes L. M. 242.) thought proper to set aside the established law, and to introduce the principle of contribution, because there was something equalising in it, that struck his fancy. If he had taken the trouble to consult the foreign writers, with whose works at other times he appeared familiar, he would have found that the rule which he thus abolished, was not only the law of England, but that of all the commercial world, and if he had reflected upon the subject, which he was well able to do, he would have been satisfied that he was not at liberty to modify the contract, between the insured and the first underwriters, it being a complete bargain and sale of eventual profit on the one side, and of indemnity on the other. (Roccus de assec, note 3.) His reputation, however, sanctioned the new principle, I am sorry to say, not only in Eng-

land but in this country, and the consequence has been, that our underwriters are compelled to insert in their policies, a special clause, which makes the old doctrine the rule between them and the insured."

That this case of alteration in the law is not an isolated one, notwithstanding the learned doctor seems to view it with surprise, will be evident to the reader hereafter, and we proceed now to present other cases of the exercise of judicial legislation.

First, let us take a very concentrated view of this subject as presented to us by the erudite and philosophical jurist, who supplied us with the instance above given.* "I admire and I venerate the Common law; not indeed, the Common law of the Saxons, Danes and Normans, nor yet that which prevailed in England during the reigns of the Plantagenets, the Tudors, and the first Stuarts; but that which took its rise at the time of the great English revolution in the middle of the seventeenth century, to which the second revolution in 1688 gave shape and figure, which was greatly improved in England in the reigns of William, Anne, and the two first Georges, but which, during the last period and since, has received its greatest improvement and perfection in this country, where it shines with greater lustre than has ever illumined the island of Great Britain. In former times, its present defects excepted, it bore no resemblance to what it is now." What a series of important mutations is embraced in these two periods. What a mass of judicial legislation must have been necessary to change the whole system of the Common law, from time to time, until it became worthy of our admiration and veneration. But this general view is, for our present purpose, too obscure and indefinite for us and our readers. We shall give particular cases of change in the law of England and Pennsylvania, effected by the judiciary.

Sir Matthew Hale and Sir William Blackstone inform us, that "by the Common law, the proceedings and determinations in the (King's) ordinary courts of justice are directed; this for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment. The rules on these important subjects, if

* Dissertation on Jurisdiction, p. 106.

they owe their origin to the Common law, which as to many is to be doubted, certainly have been by the same power frequently changed. Was it the judicial or legislative power of the courts which relaxed the stubborn maxim in the transfer of fees, requiring the use of the word "heirs," and permitted a fee simple to be created in a devise, by any words conveying such intention of the devisor; that circumvented the statute of 12 Edw. VI. confirming estates tail, and established the form of common recovery for defeating such estates, against the express and admitted sense of the statute; that converted the tenancy at will into a tenure for years, and required notice to be given for its termination; that originally established the mode of conveyance by indenture, and has since changed every essential thereof, preserving the name only; that made signing and subsequently sealing, indispensable to a deed, and has since, in Pennsylvania at least, dispensed with the latter; that rendered abortive the statute of uses, and moulded the law of trusts, establishing therein with reprehensible caprice the estate by curtesy, but denying that in dower; that, against the policy and intent of the statute of 27 Hen. VIII., formed and established the mode of conveyance by lease and release; that, as personal property by its increase in quantity and value grew into consideration, framed and established rules for its security and transfer, which, in the language of Blackstone, "were frequently drawn from the rules which the courts found already established by the Roman law, wherever these rules appeared to be well grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times, preserving withal a due regard to ancient usages, and a certain feudal tincture which is still to be found in some branches of personal property;" that denied the unqualified right of property in literary compositions; that converted the action of trover, originally designed for the recovery of damages against one who had found and appropriated the goods of another, to an action reaching all cases where one man has obtained the goods of another by any means, and has sold or used them without the assent of the owner, or has refused to deliver them on demand; or that has made the action of ejectment, originally used to obtain possession of a term for years, the means and almost the only means for determining a litigated title to the freehold? These queries might be, if necessary, exceedingly multiplied, but enough has been done to show that in

England, important changes have been made by the judiciary in every province of the law.

The scope of the Common law is much circumscribed in this state. The introduction of the principles of the Civil law in the descent of real estate, has substituted a few plain rules of common sense, for the abstruse and intricate code derived from the feudal system. And when the legislature shall have applied, if they have not already, these principles to every possible case of descent, so that legal ingenuity can find no omitted case, all the learning relative to feudal tenures will become useless, except as matter of antiquarian knowledge. Happily we have never imported any part of the ecclesiastical law of England, and our revolution has relieved us from all the law relative to the king and the aristocracy. Though thus, much circumscribed in its sphere of action, great employment was given to Common law legislation, in adapting that system to a new and growing colony. For as no portion of the English law, Statute or Common, could appertain to the colony, but such as was adapted to its situation, the very declaration that any part of such law was in force, amounted to an act of legislation; and this was, in fact, more emphatically true in relation to such of the English statutes as were from time to time adopted.

The number of English statutes extended to this country before the revolution by judicial authority, was one hundred and eighty-nine. The extent of such adoption was altogether uncertain; some part of every one of them—one or more sections—one or more sentences—one or more words, were undoubtedly law in Pennsylvania; but *a priori*, neither the legislature, the bench or the bar, could pronounce what was that part. The people, therefore, could not know these laws. This state of uncertainty is not yet entirely removed; though a great probability has been attained in relation to them, by a report of the judges, made pursuant to a resolution of the Assembly, passed in 1807, by which the judges of the Supreme Court were required "to examine and report to the next legislature, which of the English statutes are in force in this Commonwealth, and which of these statutes, in their opinion, ought to be incorporated into the Statute laws of this Commonwealth."

The power given by this resolution is of a mixed character; ministerial, so far as the report should embrace such Statutes as were undoubtedly in force; legislative, as to such as were in doubt; and also as to the discrimination of the judges in regard to those deemed proper for incorporation into our Statute law. The legisla-

ture did not design, nor did the judges understand, their duty to be confined to a search among the mass of English Statutes for such as were unquestionably in force in Pennsylvania, to extract and place them in a synoptical view, for the use of the legislature. Under a conviction that their report was, in fact, to impose conclusively upon the state, a large body of law, until then uncertain, the judges approached their task with much diffidence; and the means by which they effected it, show their views of the nature of their power. They first sought light "from the present constitution of the commonwealth." "It contained nothing particular as to the point in question." By it, "the question still remained unanswered." Nor did better fortune attend their research into the all-important act of 1777, reviving the late laws of the late province. That act, as we have seen, provided only that the Common law, and such of the Statute laws of England as had been theretofore in force, should continue in force with certain exceptions. "Still the point remained open, what English Statutes were in force in Pennsylvania." "It became necessary to mount up to the first sources of information, the Charter granted to William Penn, and the general principles of colonization." The Charter established the laws of England generally, subject to alteration by the provincial legislature. But this gave too much, and that grant must be restricted by "the true principles of colonization; viz. that emigrants from the mother country carry with them such laws as are useful in their new situation, and none other." In order to execute the duty required of them, it was necessary for the judges *to examine the code of the English Statute law, from the beginning to the time of the settlement of Pennsylvania, and to weigh deliberately which of them were proper to be adopted.*" "Besides these inquiries, it was necessary to ascertain what had been the decisions of our own courts respecting the extension of English Statutes. This was no easy task, as we have no printed reports prior to our revolution, of cases determined in our own courts of justice. Of course these decisions are only to be known by tradition, or manuscript notes in possession of the gentlemen of the bar or judges." We cannot refrain from remarking here, on the gross impolicy and injustice, which subjected the people for a period of one hundred and twenty-eight years to 189 laws, whose existence as rules of action they could not ascertain, without searching "the code of the English Statute law from the beginning to the time of the settlement of Pennsylvania, and weighing deli-

berately which of them were proper to be adopted," nor without trying these laws by the true principle of colonization.

The chief sources whence the judges sought the English statutes in force in the Commonwealth, were most proper to be examined by the power authorized to determine, what laws were applicable to the new situation of the colony. But was the power which determined this question, judicial or legislative? By the charter to Penn, the English laws relating to property and felonies, were to be the laws of the colony until altered by the legislature. Any alteration of these laws by addition, subtraction or substitution, must have been a legislative act; if by addition or substitution, a new law was imposed; if by subtraction, an old one was repealed. But putting out of question the English statute law re enacted by the Assembly, the legislature, before 1777, gave no authority for selecting such portions of the English law, as was applicable to the situation of the colony; and the extension of the Statute laws was an assumption of the legislative power by the judiciary.

The effect of this report of the judges has been, we presume, to approximate to certainty that, which was before unascertainable —to make that law, which was before not law, so far as the prescription of a rule be necessary to its obligation. And so far the judges have legislated. The effect of this report is that of judicial decision. Such is the opinion of an able reporter, who has appended it to his third volume. "This important document, says Mr. Binney, is here inserted at the request of the judges of the Supreme Court. In many respects, it deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the judges, and of their united opinion. It may not, perhaps, be considered authoritative as judicial precedent; but it approaches so nearly to it, that a safer guide in practice, or a more respectable, not to say decisive authority in argument, cannot be wanted by the profession." Other opinions, however, of this report have been entertained. Judge Roberts, late President of the Courts of Common Pleas, in the fifth judicial district, in the preface to his digest of the English statutes in force in Pennsylvania, speaks thus:

"The report is, doubtless, entitled to high respect and consideration, as containing the opinions of men who rank in the highest grade of the profession, and in the public confidence; but it ought

to be carefully distinguished from a *judicial decision*, of the character of which it does not partake."

"The distinguished characters who have made the report, it is confidently presumed, would not wish that it should be so considered; but on the contrary, that whenever the question comes judicially before them, whether a particular English statute, or any part of it, is or is not in force in Pennsylvania, they will hear without prejudice, whatever may be urged upon either side; and without otherwise adverting to the circumstance, whether such statute be comprised in the report or not, will be solicitous only to form a correct decision."

From this contrariety of opinion it is possible; and it depends altogether upon the disposition of the judges of the present and future times, to respect their predecessors, that every one of these one hundred and eighty-nine statutes, may be brought into question hereafter. However this may be, we may be allowed the remark, that if the report have ascertained which of the English statutes are in force in the state, it is in the sense of the legal maxim, "that is certain which can be made certain." The report does not give the statutes, but only the indicia by which they may be found. An example or two from the report, will enable the reader to understand us, and to observe with what difficulty a knowledge was to be obtained of law, affecting among others, the following subjects; viz. account, alien, amendments of legal proceedings, arbitration, bail, bastard, bill of exceptions, conspiracy, coroner, damages and costs, disseisin and writs of entry and assize, distress, dower, estates tail, estates for life and years, execution, executors and administrators, fines, forcible entry and detainer, fraud, guardian, hue and cry, infancy and age, jury, justices of the peace, &c. &c.

Extract from the Report of the Judges on the English Statutes.

LARCENY, MORTGAGE, &c. &c.

Book and Page.	*Year and Reign.*	TITLES OF THE STATUTES.
1 Ruffhead 35.	52 Hen. III. chap. 8.	"The punishment of those who commit redesseizin." *To be Incorporated.*
Id. 36.	52 Hen. III. chap. 15.	"In what places distresses shall not be taken." *To be Incorporated.*

Book and Page.	*Year and Reign.*	TITLES OF THE STATUTES.
Id. 37.	52 Hen. III. chap. 17.	"The authority and duty of guardians in soccage." *To be Incorporated.*
Id. 39.	52 Hen. III. chap. 29.	"In what case a writ of entry sur disseizin in the past, doth lie." *To be Incorporated.*
Id. 43.	3 Edward I. chap. 9.	"All men shall be ready to pursue felons." "That part only of this statute is in force, which provides that all, generally, shall be ready at the commandment and summons of the sheriffs, and at the cry of the county, to pursue and arrest felons where any need is." *To be Incorporated.*

The reader by the foregoing extracts from the report, will see at once the utter impossibility of the people, at large, deriving a knowledge of the existing state of the laws adverted to. Ruffhead's edition of the Statutes is referred to. Now let us see the very proper reason which Mr. Roberts assigns for publishing, nine years after the report, a digest of the statutes contained in it, and we shall pretty fully understand how mysterious a science the law of our country has been. "As a number of British statutes are in force," says Mr. Roberts, "in Pennsylvania, it frequently becomes necessary to refer to them; yet they are only to be found scattered through voluminous compilations, such as those of Ruffhead or Pickering; works which are contained in few of our law libraries."

"The very small part of those expensive works which can be of the least utility to a lawyer in this country, furnishes a sufficient reason for their general exclusion."

If the Common law originally gave force, within the state, to the one hundred and eighty nine statutes, it will be readily admitted, that its legislative power has been extensively exercised. But there are other, and perhaps more unequivocal, instances of the exercise of such power.

By the English Common law, as it stood at the settlement of Pennsylvania, a wife could convey her estate or bar her dower by fine or recovery only. But the Provincial Common law substitut-

ed for these modes a simple deed of bargain and sale, executed by the husband and wife, either with or without the acknowledgment or private examination of the latter, (*Lloyds less.* v *Taylor*, 1 *Dall.* 17.—*Davy et al.* v *Turner*, 1 *Dall.* 11.) And by the Common law construction of the acts of 1700 and 1705, subjecting lands to execution, the wife may be barred of her dower by the husband who shall contract debts, or shall mortgage *bona fide* his real estate—though by the English Common law the right of dower was held so sacred, that no judgment, recognizance, mortgage, or any incumbrance whatever, made by the husband after the marriage, could affect it: (1 *Dall.* 483, 2 *Dall.* 127.) So the Common law has introduced into Pennsylvania a new rule with regard to emblements, or as it is termed, the way-going crop. It has established a law liberating from imprisonment a debtor discharged by the insolvent law of another state, extending like curtesy to discharges given in Pennsylvania, but has denied such enlargement to persons discharged in a state which does not reciprocate with us. (*Smith* v *Brown*, 3 *Binn.* 201.—*Walsh and others* v *Nourse*, 5 *Binn.* 381.) It has determined that corporations have an inherent power to expel members guilty of offences indictable by law. It has denied interest on orders drawn by county commissioners on the county treasurer, on the ground that the custom throughout the state has been not to pay interest on such orders. It has given to the courts authority independent of statute, to make rules for the regulation of its practice. (*Vanatta* v *Anderson*, 3 *Binn.* 417.—*Williams* v *Williams Ex'rs.* 2 *Yeates* 167.) It has permitted a grantor out of possession to convey lands (*Stœver* v *Less. of Whitman*, 6 *Binn.* 416.) It has recognised and supported voluntary conveyances made by debtors to trustees for the benefit of certain creditors, in exclusion of others, (*Burd* v *Smith*, 4 *Dall.* 85.—*See also* 2 *Binn.* 186, 1 *Binn.* 616, 2 *Binn.* 174.) It has vested the courts with undefined chancery powers, confounding the English distinctions of law and equity, introducing distressing uncertainty in the determination of suits, and exercising the ingenuity of the judges to administer equity through the forms of the law, (*Wharton et al.* v *Morris*, 1 *Dall.* 125.—*Pollard* v *Shaffer*, 1 *Dall.* 211.—*Wikoff et al.* v *Coxe et al.* 1 *Yeates* 358.—*Dorrow* v *Kelly*, 1 *Dall.* 144.—*Stansbury* v *Marks*, 4 *Dall.* 130.—*Ebert* v *Wood*, 1 *Binn.* 217.—*Minsker* v *Morrison*, 2 *Yeates* 346.—*Jorden* v *Cooper*, 3 *S. and R.* 578.—*Murray* v *Williamson*, 3 *Binn.* 135.) It has settled that

the judgments of the courts, the Common Pleas among others, should be conclusive until reversed, upon matters within their jurisdiction; but that judgments of the Orphans' Court, upon points within its jurisdiction, and directly under consideration, should not be so conclusive; but might be inquired into, and reversed by courts, having no appellate jurisdiction from the Orphans' Court.—And after much confusion and mischief, it has abrogated the law, in relation to such judgments of the Orphans' Court, and placed them on a footing with the judgments of other courts, (*Messenger* v *Kintner*, 4 *Binn.* 104.—*Snyder* v *Snyder*, 6 *Binn.* 490.—*M'Pherson* v *Curliff et al.* 11 *S. and R.* 422.) It has determined that a deed shall be signed and sealed, but that a scroll with a pen is equally good with a sealing; signing being now the material part of the execution.—That a specialty is a deed, whereby a sum of money becomes or is acknowledged to be due—but that a paper, concluding "in testimony whereof we have hereunto set our hands and affixed our seals," having two subscribing witnesses, over whose names was written "sealed and delivered in presence of us," and having neither a seal nor scroll, but having the signature of the debtors, was not a specialty, (*M'Dill's less.* v *M'Dill*, 1 *Dall.* 63.—*Long* v *Ramsey*, 1 *S. and R.* 72.) It has given to all the courts the most absolute discretionary power over the rules of evidence, so that each judge, pursuing the light of his own understanding, gives scope in every cause for a writ of error; and the legality of evidence received and rejected in a cause cannot be known until passed upon by the court of the highest resort. (1 *Dall.* 17.—2 *Yeates* 93.—4 *Binn.* 326.—2 *Dall.* 118.—1 *Dall.* 65.)

We might give many more instances of the legislative power exercised under and by the Common law. What we have already given will perhaps suffice for examples of introduction of new principles in, and modifications of, the Common law itself. But there are other cases which deserve our notice. Whilst this active and subtle power admits a paramount authority in the Statute law, it assumes to itself the right of construing the statute; and under that pretence the power of limiting or repealing it. Let us examine carefully into the truth of this allegation.

A statute is the expression of the will of the supreme legislative power. If it be without limitation, as to time, it continues to be the law of the land until repealed, and until then no power ought to declare it void. This as a general position is undeniable; and

the courts hold a consistent language when declaring that "an act of Assembly cannot be repealed by non user, unless the object to which it was intended to apply or the occasion on which it was enacted no longer exists." (*Resp* v *Commissioners*, 4 *Yeates* 215. *Comth.* v *Hower et al.* 1 *Brown append.* xxviii.) We may be somewhat startled, to be sure, at the general nature of this exception; it being possible, that any change of circumstances relative to such object or occasion, may be declared to have annihilated them; but still, taking the words of the exception in their simple, obvious, and *prima facia* sense, they afford a fair rule by which to test the legitimate exercise of the power of the courts, when they determine a statute to be obsolete. If the courts declare a statutory provision to be obsolete, which does not come within the true sense of this exception, they must exercise a legislative power.

It is provided by the first section of the act of 1700, 1 Sm. L. 7, and by the fifth section of the act of 1705, 1 Sm. L. 59, "that the messuage and plantation, &c. upon which the defendant is chiefly seated, shall not be exposed to sale, before the expiration of one whole year after judgment is obtained; to the intent that the defendant or any other in his behalf, may endeavour the redemption of the same." A debtor, has always been a favourite subject for the mercy of the law, in Pennsylvania. In the spirit of mercy, this provision was enacted to give him a last chance of extrication. Has, we would ask, the object or the occasion for such provision ceased to exist? The object was, a debtor seated on lands, &c. having a judgment against him. The occasion was, an execution issued or about to be issued, before adequate time had been given to him to pay the amount due thereon. Of the policy of the original enactment or continuance of the law, we have nothing to say. It suffices that the law was thus written, and has never been repealed. But a judge of the Supreme Court, in the case of *Moorhead* v *Peace*, decided in 1799, at *Nisi Prius*, that this provision "had long been deemed obsolete, and had not been pursued." And this *Nisi Prius* decision, has been acted upon as the law of the land, in despite of the statute. 2 *Yeates* 456.

Again, a statute is sometimes partially repealed by the courts, because they conceive, that the expression of the legislature, though positive and general, is inconsistent with sound policy. A strong instance will be found of this, in the construction of the 18th section of the act of the 13th. April, 1791. 3 *Sm. L* 34. That section provides, that, if the Register's Court, upon a dispute upon

facts arising before them, shall send an issue into the Court of Common Pleas of the county, to try the said facts, which they shall do, at the request of either party, and a verdict establishing the said facts be returned, the said facts shall not be re-examined upon appeal.". The jurisdiction of the Register's court is very limited, "being confined to decisions on caveats, respecting the validity of wills and controversies, on the right to take letters of administration," and in case of a contested will, it was evidently the intention of the act, to make one inquiry conclusive as to the fact of making a will. But the Judges of the Supreme Court, differing from the assembly on the propriety of this measure, have discriminated between wills of lands, and wills of personal estate. In the case of *Walmesly* v *Read*, 1 Yeates 87, the court said, "there is nothing in the act of 1705 or 1780, or 13th April 1791, which shows an intention in the legislature, that such a probate should be conclusive evidence of a will of lands. *The court cannot wish the law should be so.* Suppose the utmost integrity and ability possessed by every register, they are still subject to error, and if even the fullest hearing has been had of all the contending parties, which is not generally the case, still new evidence and additional circumstances may turn up, which would weigh greatly in the scale of justice." This reasoning would have been well, and in place, when the conclusiveness of one inquiry was under consideration in the assembly; and seems to us to be equally applicable to a will of personal, as of real estate. For the feudal reasons which gave greater importance and value to real, than to personal estate, having long ceased to exist, a will disposing of $100,000 of stock, is entitled to full as much consideration, as one devising black acre, value one cent. But the effect of the decision above cited, supported by the cases of *Coates* v *Hughes*, 3 Binn. 506, and *Spangler* v *Rambler*, 4 S. and R. 193, has been to repeal the clause above mentioned, and to substitute the following, in the language of C. J. Tilghman. "When a writing is exhibited as a last will and testament, and a caveat filed against the probate of it, either party may demand a trial by jury; and in such case, the Register's Court directs an issue, to determine the validity of the will, to be tried in the Common Pleas. The issue being tried and returned, the Register's Court are to take the fact as settled. With regard to the personal estate, the decision is absolute, but the verdict on the issue is not considered as conclusive, with respect to real estate."

We will give one more instance of a partial repeal of a statute,

by judicial construction, founded on technical and narrow views—which rendered the statute ineffectual, reproduced in increased measure the very evils the legislature desired to remedy, and called forth another act of the legislature, confirming the first act according to its letter, negativing the constructions put upon it by the bench, and providing against like judicial interference.

"A distressing state of uncertainty with regard to the existence or extinction of incumbrances had arisen, from the practice of paying money to the plaintiff or his attorney, without having satisfaction entered on the docket. From this cause the records were crowded with judgments, that were apparently outstanding. The purchaser was frequently embarrassed in procuring the requisite proof of payment, where payment had in fact been made; he could not tell when he was safe in buying; whether the purchase money would be sufficient to discharge incumbrances; or how to appropriate it, when it would; so that the free transmission of real property by sale, so congenial to our habits, was seriously impeded."* To remedy this grievance, the legislature passed the act of 4th April 1798, (3 Sm. L. 331.) providing, that "no judgment hereafter entered in any court of record within this Commonwealth, shall continue a lien on the real estate of the person against whom such judgment may be entered, during a longer term than five years from the first return day of the term of which such judgment may be entered, unless the person who may obtain such judgment, or his legal representatives or other persons interested, shall, within the said term of five years, sue out a writ of *scire facias*, to revive the same."

And by section 2, "That all such writs of *scire facias* shall be served on the terre tenants, or persons occupying the real estates, bound by the judgment, and also, where he or they can be found, on the defendant or defendants, his or their feoffee or feoffees; and where the land or estate is not in the immediate occupation of any person, and the defendant or defendants, his or their feoffee or feoffees, or their heirs, executors or administrators cannot be found, proclamation shall be made in open court, at two succeeding terms, by the cryer of the court, in which such proceedings shall be instituted, calling on all persons interested, to show cause why such judgment should not be revived; and on proof of due service thereof, or on proclamation having been made in the manner herein set forth, the court from which the said writ shall have issued,

* Pennock *v.* Hart, 8 S. & R. 379.

shall, unless sufficient cause to prevent the same is shown, at or before the second term, subsequent to the issuing of such writ, direct and order the revival of any such judgment, during another period of five years, against the real estate of such defendant or defendants; and proceedings may in like manner be had again to revive any such judgment, at the end of the said period of five years, and so from period to period, as often as the same may be found necessary."

This statute afforded a sufficient and proper remedy for the evils which occasioned it, had it been literally pursued. But the courts, pressed by some cases of particular hardship, and seduced by technical analogies, having undertaken to limit and direct its operation, reproduced the state of confusion which had prevailed before its enactment. The first question which was mooted before the courts under this act, presents us with a signal instance of the uncertainty and inconsistency of judicial legislation. It became necessary to decide, whether this statute was confined in its operation to cases of purchasers, or whether it extended to subsequent judgment creditors? Or, in other words, did it avoid a prior judgment not revived according to the act, in favour of a subsequent judgment? In the construction of the act upon this point, the Circuit Court of the United States, and the Supreme Court of Pennsylvania, reasoning from the same data, have attained diametrically opposite conclusions. The former have decided, that a judgment not so revived, continues a lien on the real estate, as against subsequent creditors; the latter, that it ceases to be a lien, as well against subsequent judgment creditors as against purchasers. (*Bank N. A.* v. *Fitzsimmons*, 3 *Binn.* 342. *Hurst* v. *Hurst*, *Cir. Ct.* 3 *Binn.* 347, *in note.* 3 *Sm. L.* 332.) Whoever examines the mischief, the remedy, and the language of the statute, will not hesitate to say, that the Supreme Court has given the true construction, whilst the Circuit Court has been biassed by that besetting seduction, the hardship of the case in which they were required to apply the law.

The act of 1798 declares, that a judgment shall not continue a lien, for a longer period than five years, unless revived by *scire facias*, executed in a manner specially directed. The Supreme Court declares, that, however general and mandatory may be the words of that act, it shall not extend to a judgment which has been kept

alive, by execution issued within a year and a day after rendition of the judgment, *Young* v. *Taylor*, 2 *Binn.* 218; and that a judgment upon which an execution is thus issued, shall continue, unless satisfied, for more than five years, and for an indefinite time, and that too, though the execution be not returned. This decision went to perpetuate the evils arising from open judgments, and to limit greatly the beneficial operation of the act of 1798. A search of the record for five years back, was no longer sufficient to protect the purchaser or subsequent creditor against unsatisfied judgments—he must search, whether at any time a judgment had been obtained, and whether an execution had been issued upon it. —"He could not tell when he was safe in buying; whether the purchase money would be sufficient to discharge incumbrances, or to appropriate it when it would." The court however opened the gate for litigation still wider, by rendering this "distressing state of uncertainty" still greater. In the case of *Pennock* v. *Hart*, 8 Sergt. and Rawle, 369, it was determined, "that the five years within which it was necessary to sue out a *scire facias*, to revive a judgment under the second section of the act of 4th April, 1798, begin to run, where there is a stay of execution, from the expiration of the period during which the execution was suspended. And if a *scire facias* be sued out within five years, which is returned by the sheriff, that it came too late to be served; and an *alias scire facias* issue, after the expiration of that period, and after a term of the court has intervened, the process may be connected, and the commencement of the proceeding must be referred to the issuing of the original *scire facias.*" Thus, if A give his bond to B, conditioned for the payment of $1000 within five years from its date, and judgment be immediately entered on such bond, it would not be necessary to issue a *scire facias* to revive the judgment, until ten years after the first day of the term, of which such judgment was entered.—And if then such *scire facias* be issued too late to be served, and an *alias scire facias* issue after the expiration of such ten years, say within ten or twelve years from the first day of such term, it will be in good time, for the lien of the judgment has never been loosened.

These several cases of construction, did not, it is true, operate to the entire repeal of the act of 1798, but did repeal it absolutely, as to three classes of cases which were within the mischief, and should have been within the remedy: viz. I. Where execution had been issued, within a year and a day after the entry of

the judgment.—II. Where a stay of execution was entered upon the record, and III. Where a time, subsequent to the rendering such judgment, was appointed by the parties, for the payment of the monies for which such judgment was entered. As soon as it was fully and generally understood, that this important statute had been crippled by the bench, the legislature applied themselves to its restoration; and by the act 26th March, 1827, they reprobated the construction of the judges, enumerating the three cases above mentioned, and endeavoured to manacle the courts, so that they should not again interfere to prevent the operation of the act, by declaring, "that no order or rule of court, or any other process or proceeding thereof, shall have the effect of obviating the necessity of the revival, in manner herein prescribed, of any judgment whatever."*

The principles exposed by the Court in the decision of the case of *Pennock* v. *Hart*, merit our serious attention. If doubts have lingered in the mind of the reader as to the legislative power appertaining to the courts by virtue of the Common law, we think they must be removed by an examination of the opinion of the court in that case. We extract some of its strongest and most objectionable sentences. "If statutes," says Judge Gibson, "were in all cases construed according to the letter, scenes of injustice, which those who enact them would deplore, would abound in our courts. It is impossible for any legislature to foresee the infinite variety of cases that fall within the letter of the law they are about to enact, and yet be out of the scope of its aim. When one of these occurs, what are the judges to do? It seems to me, they ought to do what their consciences irresistibly persuade them the legislature would have done, if its occurrence had been foreseen. *No judge ever arrived at a wholesome conclusion by following the letter either of the written or the unwritten law.* No one ever supposed that a system, complete in all its parts, could be struck out at a heat by the most able lawgiver that ever lived. The legislature, with all the skill and care which knowledge and diligence can bestow, are able to do little more than mark out principles; their application, as *well as the more minute details, must, in general, be left to the courts, as cases may from time to time arise; particularly where the enacting power has legislated only on a part of the subject.* A too severe application of the common law rules, forced the Court of Chancery into existence in England.

* Act 26th March, 1827. Pamp. 129.

The body of the Chancery law is nothing else than a system of exceptions, of principles applicable to cases falling within the letter, but not within the intention of particular rules ; or, if falling within the letter, yet not within the intention. The exercise of equity powers in every government of laws, is conclusive proof of a necessity that they be lodged somewhere. Every rule, from its universality, must be defective : the truth of this is perceived the instant we come to apply it to particular cases. It would be strange to permit the exercise of such powers in respect to laws founded in usage, and which have been gradually formed from the experience of ages, and deny them to those that are formed of a sudden, and without any experience of their operation in practice. It is frequently necessary for the purpose of preventing the actual intention of the legislature from failing of its effect."

This extract furnishes a text for a volume of comment. But we must confine ourselves to a very few remarks. We are gravely asked by the judiciary, by the power theoretically appointed to administer, not to make the law, what the judges are to do if cases come before them which fall within the letter of the law, and *yet are out of the scope of its aim ?* We answer in the language of Professor Blackstone, as explained by Professor Christian : "Acts of Parliament that are impossible to be performed are of no validity," says Blackstone, (1 Com. 91,) "and if there arise out of them *collaterally* any absurd consequences, manifestly contradictory to common reason, they are, with regard to those *collateral consequences,* void. I lay down the rule with these restrictions, though I know it is generally laid down more largely ; that acts of parliament contrary to reason are void. But, *if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it ;* and the examples usually alledged in support of this sense, do none of them prove, that, *where the main object of the statute is unreasonable, the judges are at liberty to reject it, for that were to set the judicial power above that of the legislature,* which would be subversive of all government. But, where some *collateral matter* arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude, that this consequence was not foreseen by the parliament ; therefore, they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it." In this latitude of construction claimed by the learned commenta-

tor, there is no pretension to supply the "minute details" to the "general principles furnished by the legislature;" or, "where the enacting power has legislated only on a part of the subject," to authorise the judiciary to legislate upon the remainder. But Mr. Christian takes just exception to the terms used by Blackstone; and, in a note on the foregoing passage, remarks: "If an act of parliament is clearly and unequivocally expressed, with all deference to the learned commentator, I conceive it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear. If the expression will admit of doubt, it will not then be presumed that that construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable; *but where the signification of a statute is manifest, no authority less than that of parliament, can restrain its operation.*

By what authority, constitutional or rational, do the courts erect themselves into a supervisitory tribunal on the legislation of the assembly, and provide, *a posteriori*, for "the infinite variety of cases that will fall within the letter of the law, and which they presume was impossible for any legislature to have foreseen?" If we were not estopped by the highest judicial tribunal in the state, we would say, that the obvious presumption is, that the legislature did foresee every case appertaining to the subject, which falls within the clear literal sense of their enactment, and that they believed individual hardships ought to be suffered for the general good. With the most conscientious exercise of their understandings, we might be allowed, from the evidence hitherto given, to doubt, whether the judges, supposing them justified in the attempt, would be always successful in determining what cases, within the letter of the law, are not within *the scope of its aim.* Certain it is, that all the cases which the courts have decided not to be within the *scope of the aim* of the act of 1798, the case inclusive, in which the above opinion was given, have proven, so far as the sense of the legislature of 1826–7 can be evidence, to be not only within the letter, but within the very *scope of its aim.* That cases have arisen, and may again arise, in which the execution of the law, according to its letter, may be productive of much hardship, cannot be denied; but they are not numerous, and, under the vigilance of an annual legislature, may be soon remedied by a proper modification of the general rule.

Having shown, conclusively as we think, the existence of a Common law power of legislation, which Mr. Duponceau, we believe, recognises under the name of a "Common law source of jurisdiction," we will take occasion to offer some observations on the propriety of this power. In every well organized political state—indeed, in every political state not a despotism, the powers of the government are divided into legislative, executive, and judicial. Upon the preservation of these powers separate and distinct, depends the harmony and excellence of the government. The duty of the legislative power, is to prescribe rules for the government of society; that of the judiciary, to apply such rules to their proper cases. If the judiciary power assume to make rules, whether directly or indirectly—whether in the form of precept, or by the decision of cases with a view to the establishment of general rules, it usurps the legislative power, and by confounding it with the judicial, approximates to despotism. If there be two legislative powers in the state, though one be subordinate to the other, it will be impossible to prevent collision between them, unless the powers of the latter be rigidly limited. If there be two powers, one to create and one to model, one to give the material and the other to give it form; one to hew the block from the quarry, and the other to work out the image; one, in the language of C. J. Gibson, "to mark out principles," and the other to give "the minute details," we shall have inevitably two contending principles in possession of every subject, *per mi et per tout*, perpetually united, but perpetually oppugnant. From such sources the law must be mutable, uncertain, and unknowable; and can fail to be intolerably oppressive, only because the judges are upright, have an interest in common with the people, and have reason to fear the intelligence and power of the legislature.

But if it were possible, to suppose that two legislative powers might properly exist in the state, one of them should not be the judiciary. Because,

I. Their mode of legislation is *ex post facto:* the law being always declared, upon the case submitted, and consequently after the event which calls for the application of it has happened. "Though new in *fact*, yet being of the greatest antiquity in *theory*, it has necessarily a retrospective operation, and governs all past, as well as future transactions. Property which had been purchased, or transmitted by descent, to the present possessor, is discovered, by

the newly declared law, to belong to others; actions which were thought to be innocent, turn out to be criminal; and there is no security for men's possessions, their persons, or their liberties.

II. Because "The judges are confined to technical doctrines and artificial reasoning, and are compelled to take the narrowest view possible of every case upon which they legislate. They are forbidden, when providing for the particular case before them, to consider the cases which may probably arise, and for which a remedy should be provided. If even, in illustrating the ground of their judgment, they advert to other and analogous cases, and anticipate how they should be decided, they are considered as exceeding their province, and their opinions on such cases are treated by succeeding judges as extra-judicial, and unauthoritative."

III. Because there will necessarily be as many distinct legislatures, as there are judicial tribunals; all legislating conclusively on cases in which there is no appeal made, and giving constant employment to the Supreme Court to annul such rules, or to remould them when appeals are made.

IV. Because the judges, though the wisest of their order, cannot be competent to legislate upon all subjects—yet a man taken from the bar, whose life, perhaps a short one, has been spent chiefly in technical studies, or dissipated in political squabbles, may, by a mere letter patent from the executive, be converted into a lawgiver upon all the vast variety and important interests of society.

V. And lastly, and for a reason certainly not of the least weight, judicial legislators are irresponsible to the people. They are appointed at the sole pleasure of an individual, and are removeable with great difficulty and after great delay. The legislators known to the constitution, are annually returned among the people; any error or misfeasance may be speedily corrected by a change of representatives, and the evils of improper legislation be immediately remedied. God forbid, that we should wish the judiciary less independent than they are. As the ministers of the law, they should be above popular delusion, above popular favour; but legislators should never be above popular control.

The province of the judiciary we believe to be simply to declare and apply the known rule of law to the case brought before them. It follows, therefore, if a case be presented, for the decision of which there exists no established rule, that the judiciary shall not make one, nor adopt one from the code of other countries. Such cases, and in the improved state of jurisprudence they will not be

numerous, should be reported to the legislature, by whom a rule may be made for like cases in future, and if the cases presented will admit a constitutional remedy, such remedy may be provided.

But are there not cases within the spirit, though not within the letter of the known laws? And if there be, shall not the judge pass upon them? There are such unquestionably; but in proportion to the care and attention of the legislature, they will be diminished. When such cases arise, it is the better choice of evils, to suffer the judge to consider them as embraced by the act—and for the legislature to provide for them, by statute, as soon as possible after their discovery.

But shall the judge have no discretion in the application of the law, in cases where its letter involves gross absurdity, violent injustice, or breach of duty? Certainly he shall. The rules universally adopted for construing the law, are the dictates of common sense, and are to be followed at all times. The suppositious cases above put are few; but should our law, like that of Bologna, make it highly penal to draw blood in the streets, we would have our judges refuse to inflict the penalty upon the surgeon, who should open the vein of a person that fell down in the street with a fit; or should a statute be opposed to the constitution, we would have them refuse obedience to the former, because their duty and their oaths require them to choose between the supreme and subordinate laws. But, shall the judges have no legislative power whatever? Yes. Within certain prescribed limits, they shall make rules for conducting business in their courts, and determining the duties of their officers. Yet, even in regard to these, we hold it wise, that they should receive the sanction expressly and specially given of the legislature, if for no other reason, that a uniformity in such rules should prevail, so far as is possible, throughout the state.

We shall be told, however, that in the existing state of the law, it is not possible to confine the judiciary within these, their proper limits. This is a position we will not undertake to controvert. But we will express our firm conviction of the possibility so to mould the law, that known and proper bounds may be set to the judicial power.

Having thus endeavoured to show what the common law is, we shall next proceed to examine it, in regard to its qualities of certainty and cognoscibility. The Common law, we are told, is an unwritten law. This, however, is one of the many fictions which belong to the system. "It is to be known by the judges in the

several courts of justice, as Professor Blackstone informs us, who are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land." Unfortunately this declaration is too well founded to be denied; and the law cannot be assuredly stated upon many cases submitted until it be determined by the court. But a knowledge of the Common law is supposed to be attainable, by consulting the reporters from the reign of Edw. II. A. D. 1307, the various abridgments and digests, and the treatises upon distinct branches of the law. In the reports, small portions of the law are declared at a time, just so much as the case under consideration required—and the cases upon all the variety of human affairs, are arranged, generally speaking, in the order of their date, so that no continuous or systematic view, can be obtained of any title in the law, from the perusal of the reporters. The student who looks to the reports only for instruction, will find it necessary to digest the cases under proper heads, and to infer from them the general rules, after having stript them of the arguments of counsel, and the illustrative matter which not unfrequently cover and obscure them. The abridgments and digests, are collections of the adjudged cases, and the statutes relative to the titles under which they are classed—for the most part clumsily arranged, containing the existing and obsolete law, the authoritative, the overruled, and the unreconciled cases, the dicta of the judges, and the remarks and doubts of the compilers—from these, an uncertain, but yet more steady light than is given by the reporters, is attainable. In the treatises on particular subjects, the law is more carefully collected and more scientifically arranged. The rules, however, are most generally overburdened by unnecessary comment or illustration by extracts from decided cases. From these reports, abridgments, digests, and treatises, amounting to several hundred volumes, (I think C. J. M'Kean has said twenty thousand,) it is possible to obtain a general notion of the law upon any given topic, which may be rendered definite and useful to an American inquirer, by the following process. Let him compare the English cases, with such as have been determined in the Supreme court of the United States, and in the courts of the several States, *in pari materia*, if any may be found. If there be no such cases, let him divest the law as he finds it in the English books, of those features which the English institutions have impressed upon it, and then adapt it to our systems. Having thus extracted the rule, let him not rashly suppose, that he may

give an entirely safe opinion upon any case to which it applies; for he has to dread, lest the rule, as he has gathered it, has been unsettled, perhaps overthrown, by some decision which he has not seen or has not properly appreciated;—that the judge may find it inconsistent with sound reason, or the nature of our institutions;—or that some equitable principle, which the court feel it incumbent on them to introduce, will ride over the legal principle, and decide the case on grounds which he has never foreseen.

The following is a striking illustration of the uncertainty of the law, and of the shoals and hidden dangers which encompass a suitor.*

"A. B. engages in a suit upon the authority of a particular decision, within which, as it stands recorded in a certain report, the facts of his case undeniably fall. If the law of the subject had been reduced into the form of an enactment, that enactment would have either recognized and adopted the principle of the decision; in which case A. B. must necessarily have succeeded; or it would have swept the decision away, in which case there would have been no loop-hole for litigation;—but it is not an enactment; and his opponent therefore, without much imprudence, may litigate the case, right or wrong, upon the chance that the authority in question will be invalidated by some one or other of the following accidents:

"The report relied on by A. B., though it forms the sole authority on the point, may be extant only in some work of doubtful credit."

"There may be one or more other reports of the same case, in the works of some one or more other reporters, representing the case in a view less favourable for A. B.—and the more numerous these reports, the greater, of course, are the confusion and uncertainty."

"A search among the records may disclose facts, not stated in the report, which may have influenced the decision; but which, not existing in A. B.'s case, leave it open to argument, whether his case is in reality at all assisted by the reported decision."

"The point in the report relied on, which is analogous to the point in A. B.'s case, may not have been the principal question in the case reported, but may have been either irrelevant altogether, so as to reduce the court's opinion upon it, to a mere *obiter dictum*, or at most but collaterally and weakly relevant."

"The judge, who in old time pronounced the decision relied on,

* This illustration is copied from a work of Horace Twiss, Esq. who has taken it from Mr. Bentham's supplement to papers on codification.

may have been deficient in political or private probity, or in intellect or learning."

"The court which pronounced the decision relied on, having perhaps consisted of several judges, divided in opinion, the majority in number may have been for the construction which supported A. B., but the majority in estimation for the opposite construction."

"The state of the times may have been such as to produce an undue, and now no longer continuing inclination, in favour of the doctrine relied on by A. B."

"The general opinion of the bar, may have been decidedly and notoriously opposite to the decision which A. B. relies on."

"There may be a manuscript report of the same point, decided in the same, or in some other case, which report is in the possession or within the reach of the adverse counsel, who produces it if he finds it suit his purpose, otherwise not, &c. &c. &c."

We will add here the summary of evils given by Lord Bacon, as flowing from the state of the law in his time, and which have not been since amended.

"That the multiplicity and length of suits is great."

"That the contentious person is armed, and the honest subject wearied and oppressed."

"*That the judge is more absolute*, who, in doubtful cases, hath a greater stroke and liberty."

"That the Chancery courts are more filled, the remedy of law being often obscure and doubtful."

"That the ignorant lawyer shroudeth his ignorance of law, in that doubts are so frequent and many."

"That men's assurances of their lands and estates, by patents, deeds, wills, are often subject to question, and hollow, and many the like inconveniences."

From the views we have thus exhibited, it is apparent, that none but the lawyer with his well stored library has access to the law—that to him such access is uncertain, difficult and laborious—that the judge himself, attains his knowledge of it by the debates of counsel, and consultation with his many books—that the people, for whom the law is made, who require to know it, that they may duly fulfil their social duties, are entirely occluded from such knowledge, and that for them, the Common law is not only uncertain, but unknowable.

We now proceed to consider by what means the certainty and cognoscibility of the laws may be given, or improved.

In a government of laws, the accumulation and consequent intricacy of the laws is inevitable; and their free and impartial administration is more dilatory than the execution of the despot's mandate. But the burden and delay at length become intolerable, and require, as they excite, extraordinary efforts for relief. More than once the laws of the Roman state were collected, arranged, and simplified. Several of the European continental powers have found such a measure indispensable to the happiness of their states: among these the Prussians and the French are most conspicuous. The genius of Frederick and Napoleon, have amid the desolations of war left an oasis where their wearied people might find shelter and repose. The necessity of amendment and simplification to the English law has been admitted by its most profound sages, and plans have frequently been suggested for this purpose, but their adoption has been procrastinated by the influence of the higher orders of the state, lest amendment should in its course become ungovernable, and like an overwhelming tide, sweep before it banks and barriers; levelling to a plane the cherished inequalities of English society. But at length the accumulation of the laws have become so intolerable, that the ministers of the government have been compelled by the popular voice to marshal the way to improvement. The civil code of that country, has already been disburdened of a large and confused mass of statutes and judicial decisions relating to the bankrupt and insolvent systems, and its place supplied by two acts only. The inquirer may now find within a moderate compass, the law on these important subjects, and as far as common sense can be a guide, may understand them.* The criminal law, hitherto the foulest blot on English history and English jurisprudence, is about to undergo a thorough revision and consolidation, and it is earnestly to be hoped substantial amendment. And already propositions very respectably supported, have been made for a new code of laws relating to real estate, and for the revision and systematizing the whole civil code.

Lord Bacon, than whom no thinking man need ask higher authority, submitted to James the First, a project for the reformation of the statute and the Common law. His plan is as practicable at the present day, as when it was offered, and the necessity for its adoption has certainly not diminished. Speaking of the written law, he observes, "There is such an accumulation of statutes con-

* The bankrupt law of Great Britain prior to the act of 6 Geo. 4. c. 16. was dispersed over twenty-one statutes, and as many hundred decided cases.

cerning one matter, and they so cross and intricate, as the certainty of the law is lost in the heap." And for remedy thereof he recommends "to discharge the books of those statutes where the case by alteration of time has vanished, and of statutes long since expired and clearly repealed—to alter or repeal statutes sleeping and not of use, but yet snaring and in force—and to reduce concurrent statutes heaped one upon another, to one clear and uniform law."

In 1796, a committee of the House of Commons on temporary laws made a report on the revision and amendment of the statute law, in which they enumerate the following distinguished persons, as having recommended or been engaged in such a labour, viz. Lord Keeper Bacon, Lord Verulam, Lord C. J. Hobart, Serjeant Finch, Mr. Noy, Lord Commissioner Whitelock, Lord C. J. Hale, Lord Chancellor Shaftsbury, Mr. Rushworth the historian, Lord Chancellor Nottingham, Serjeant Maynard, Sir Robert Atkins, Mr. Prynne, and the late Lord Chancellor Eldon. This goodly array of names we know will weigh heavily in the scale of opinion with many opponents of reform in this country, whilst others ignorant of, or denying the similarity, between the evils of our and the English statutory code, will ask for the opinions of distinguished American lawyers favourable to such reformation. We will endeavour to gratify them. Mr. Roberts, in his preface to his edition of the English statutes in force in Pennsylvania, having noticed the attempt made in the reign of James the First, to revise and consolidate the law, remarks that "a review of our own statute book is *perhaps* also requisite." Whoever reads the whole of that preface will discern that the writer is an unwilling witness; "hence the introduction of his halting perhaps." The judges of the Supreme Court however speak more freely. "In perusing the statutes referred to in the report (on the English statutes) the legislature will perceive, that in many of them the language is uncouth, and unsuited to our present form of government. In many of them too, they will find here and there a sentence not properly applicable to any other country than England. There is no other way of curing these defects, than by re-enacting the substance of these statutes in language suitable to our present condition, which might be attended with the additional advantage of simplifying the statute law, by reducing into one, several acts passed on the same subject."

In Virginia, a consolidation of the statutes has been made in their revised code, and New-York, whilst we write, is engaged in the

amendment, simplification, and codification of her statute law; and commissioners appointed by the state of Pennsylvania are employed in the revision and consolidation of her criminal jurisprudence.

The statute law is divisible into three great classes. The first, altogether of a private nature, relates exclusively to individuals. With laws of this character, already enacted, no interference can be made. But in future laws of this class we may recommend greater perspicuity, by amendment of the statutory style. The second class is of mixed character, embracing such statutes as incorporate individuals for purposes of private interest, but in relation to subjects of a public nature. Such are the acts incorporating banks, turnpikes, canal, insurance, and manufacturing companies. Such of these as have created contracts between the state and individuals, are unalterable, but by the consent of the parties interested; and it may be assumed, that they are not within the scope of amendment. But future acts of this description may be simplified by a statutory definition of the ordinary powers and constitution of a corporation. Thereafter, in the creation of a corporation, the simple declaration that it shall be a body corporate, will give to it the ordinary powers of a corporation. Special powers must in all cases be distinctly given. The third class comprehends public laws relating to the whole community, or classes thereof, including the incorporations of cities, towns, and boroughs; and these only should be consolidated.

The remedy we would propose for the evil condition of the Statute law, is

1. To reduce the several acts relating to the same subject, into one act.

2. To substitute for the present verbose and obscure style, a clear and simple one.

3. To incorporate into the Statutes, the additions and instructions made thereon by judicial decisions, so far as they shall be approved by the legislature.

4. To arrange the Statutes in a lucid and dependant order, so that a systematic view of the law may be obtained.

5. To repeal all Statutes specially by their titles and dates, which shall be supplied by the consolidated acts.

The advantages of this plan are, 1. "It brings under one point of view, that which now lies scattered over the face of many volumes. 2. It ascertains the reciprocal influence which a variety of

Statutes, each applicable to the same subject, have upon each other; a knowledge which, under the present state of things, it is matter of the greatest difficulty, nay, often of impossibility, for the most comprehensive mind to attain. 3. It detects and reconciles those contradictions and inconsistencies so constantly observable where a number of Statutes have been applied from time to time on the same subject. 4. By reducing the law to greater certainty, it diminishes litigation, and exhibiting a clear, distinct, and connected view of that law, it enables us to observe, and observing, to supply those particulars in which it is defective." 5th. It affords to the legislature an opportunity to settle the meaning of the Statutes, rendered doubtful by conflicting judicial constructions, or, where an unopposed construction is erroneous, to correct it. 6th. By incorporating the decisions of the courts with the subject matter of the respective Statutes, a knowledge of the law may be obtained without reference to any other than the Statute book. And, 7th. By a proper classification of the Statutes, the citizen, and more especially the student, will have that comprehensive view of the law which scientific arrangement alone can give, and which cannot be obtained from the necessary chronological arrangement of the Statutes at large, or from the alphabetical one usually adopted in our digests.

In the execution of this plan, great care should be taken to bring forth every distinct provision of the consolidated Statute into full and bold relief, by placing it in a short proposition, and noting its contents in a marginal abstract.

To enable the reader thoroughly to understand, and properly to appreciate, the proposed plan, we have appended hereto the Statute law relating to apprentices, with the judicial construction thereon. In the classification of the law, this subject might form a chapter of the title "Of master and servant." The other chapters would relate to German and other redemptioners, negroes and mulattoes, &c.

Much prefatory labour has already been performed towards the work of consolidation. Mr. C. Reed and Mr. Purdon, in their Digest and Abridgment, have made a very useful collection and classification of much of the Statute law of a public nature. It is, however, still necessary to explore the whole of the Statute books, as well for the purpose of including whatever they may have omitted, as for recasting the subjects, that they may be more effectually adapted to such system of arrangement as should be deemed most advisable.

The invaluable labours of Mr. Smith, will also essentially serve the compiler of the new Statutory code. They will afford him the means of annexing to the work, a history of the law upon every subject which has received legislative attention.

It is certain that the rule of the Common law has for the most part an actual existence, antecedent to the case to which it is applied. It is discoverable with more or less labour by the judge, and must be discovered by him before he can determine the cause. It is therefore practicable to collect such rules, and by systematic arrangement to prescribe for the greater part of our social relations. This being conceded, it follows that such rules may be ascertained and made absolute by legislative enactment, and the whole of the unwritten or common law may be reduced to a written code. To this it has been objected, 1, that any attempt at codification, by the legislature, would break up the law and destroy its symmetry: 2, would be a new moulding of the law, requiring new judicial construction to fit it for use: 3, would be of temporary utility: 4, that such code would not be generally intelligible, since the technical terms would still remain, and their sense must be sought for in the old writers: and lastly, that the labour would require more time and money than could conveniently be expended upon it.

These objections merit our attention. 1. It appears to us that there is a great misconception of the term codification, by those who have viewed or affected to view it with apprehension. If we are to understand by it, a new system of laws, stricken out at a heat, to be substituted for those which have grown with our growth and strengthened with our strength, then indeed codification is much to be dreaded. But if it means a scientific arrangement of those rules, which have been matured by time and experience, but which now lie half buried amid decayed and heterogeneous masses; a simplification of that which is now too complex for beneficial use; a lucid exhibition of that which every citizen is desirous to behold, surely codification, is a consummation of the labours of the past and present ages most devoutly to be wished. What are our abridgments and digests, but imperfect codifications? what are our treatises upon the several parts of our laws, but partial codifications? Why then shall we not possess a more perfect and general codification? if the rule of law drawn from imperfect and obscure codes be authoritative with the courts and the people, will it be less obeyed, when clearly set forth in connection with all its relations, and retaining all its integral distinctness?

It has been epidemic with the profession, until of late years, to speak of the symmetry of the Common law. But the most deformed images of the idolatrous, are not the least worshipped. It would have been a wonderful chance if a creature such as the English or American Common law now is, should have been symmetrical. Its parts have been moulded at different periods, under variant and discordant impulses, and by every grade of artists, but rarely has any of those parts been fashioned, with a view to the just proportion of the whole. Some of them are indeed beautiful, but they are often put together most clumsily and inartfully. In the language of Dr. Duponceau, the Common law "viewed altogether, presents a rude and misshapen mass, *rudis indigestaque moles.*

2. Codification would be indeed a new moulding of the law, but it would not be a change of its material. The half worn, defaced, and almost useless coin, would issue from the mintage with new splendour preserving its intrinsic value. The misshapen limb might be reduced to symmetry and usefulness. The corinthian brass composed of various materials, would still be the same useful metal, cast in a more commodious shape. But the language and collocation of the legal rules will be altered. But is the language which clothes the same rule of law now the same in the various authors who have treated of it? do Littleton, Coke, and Blackstone, give us the canons of descent in precisely the same terms? But the rule is not less invariable, whether given in the Norman French of the first, the uncouth and obsolete English of the second, or the polished and modern style of the last. Nor are the principles which governed the contracts of bailment, less forcible or more difficult to be understood because they have been scientifically collocated by Sir William Jones. Nor are those rules relating to contingent remainders, less comprehensible when lucidly connected by Mr. Fearne, than when scattered over the numerous reports from which he drew them. But if uniformity of language and of place, for the rules of the law, be desirable, (and who shall gainsay it?) will they not be most certainly obtained by codification?

3. It is said, that every code of laws, however perfect and clear at its formation, will in process of time, be loaded and obscured by commentaries. Such has been the fate of the Justinian Code, and of the various English compilations, and such will be the fate of the Code Napoleon. But the more perfect the code, the greater

will be its duration. The Roman Code, has outlived the empire in which it was founded, and many succeeding ones. Kingdoms and states have flourished and decayed; but this offspring of common sense still continues vigorous, and is the basis of the law of continental Europe. But nothing human is immutable. Shall we not build, because time will destroy the result of our labours, or compel us to renew them for its preservation? Shall we not seek present happiness, because we must continue to labour, that we may preserve our acquisition? Let us once submit to this slavish fear of evil, and all that we have wrested from the empire of barbarism will speedily be restored to it. But, the evils of the present system of jurisprudence are becoming intolerable; we must conquer them, or they will overwhelm us. If the remedy we shall apply to them, shall cease to be alike beneficial to posterity, let our successors exert the energy by which we may obtain relief.

4. Technical terms are the hand-maids of science and of art. Happy is that science in which they are most connected, and least arbitrary. In this respect, modern chemistry has the advantage over all other sciences. If some Lavoisier should arise in the law, and invent a nomenclature, equally comprehensive and particular as he has given to chemistry, he would gain, as he would merit, eternal praise. But of this we are desperate, notwithstanding the efforts of Mr. Bentham. In proportion as any art or science becomes familiar, its nomenclature will be generally understood. The greater part of the community understand the technicals of the handy-crafts; and few complain of the pillaster, the architrave, the facie, the plinth of the architect; the gudgeon, the wallower, the pinion, the hopper-boy, and the spindle of the miller; or the drum, the throstle, the mule, the bobbin, the flyer, the double speeder, the shuttle, the healds, &c. &c. of the cotton manufacturer. Nor are there many business-men among us, altogether unacquainted with the terms of the law. But supposing the public ignorance, in this respect, greater than it is, the evil is not irremediable. In the present state of legal science, it is quite as difficult to obtain a knowledge of the terms as of the principle of the law. A glossary or dictionary of terms could be framed, with quite as much ease as a systematic exposition of the law. Besides, the compilers of the code might dispense, wherever it could be done, without circumlocution, with many technical terms, and introduce into the code, with propriety, the definitions of others, as has been done in the Institutes of Justinian, and the Code Napoleon.

5. If the benefits of codification be such as we have supposed them, they will be cheaply purchased by any expenditure of time and money which may be necessary. But, in truth, neither of these is of sufficient magnitude to create alarm. The digest of the Roman law, in fifty books, compiled by the orders of Justinian, from more than two thousand volumes, was completed in three years; and if this be, as Mr. Duponceau assures us, the heroic age of our country, demi-gods will be found among us endowed with strength for herculean labours. It is not to be expected that the legislature in a body can apply itself to the collection and arrangement of the law. This must be done through the agency of commissioners appointed expressly for that purpose. Committees of the several houses could not be employed upon it, as they cannot endure for a sufficient length of time; and the continuance of the same agents from the commencement to the completion of the work, is almost indispensable to its perfect execution. By the agency of such commissioners, it would be practicable for the legislature, in a few years, to collect and arrange systematically, under proper heads, all the *settled* rules of the Common law, together with such as are derived from the Equity courts, which are, indeed, but portions of the Common law; and to blend them into one code, excepting doubtful and repugnant rules, for the special consideration of the legislature. On the report of the commissioners from time to time, a special session of the legislature might be holden, and, after mature deliberation, portions of the code might be adopted. The laws thus enacted and duly published, would possess as much certainty and cognoscibility as could be given to them; and, consequently, the legislative power of the judiciary would be reduced within proper and narrow limits.

What is to be dreaded in such a revision of the law? Shall we be deterred from the attempt by the abject fear of innovation on the institutions of our ancestors? All that they have left us, and which we are taught to consider as sacred, was once innovation. They were not prevented from seeking an acknowledged good, from the fear of unknown evils. We have the most profound veneration for the labours of our fathers, but the greatest debt of gratitude is due them for the power we possess to investigate and decide on the value of the legacies they have left us. This power we have already used to a great and beneficial extent, though frequently amid alarming cries and prophetic warnings of the danger of innovation. We all remember the vain predictions on the extension of the civil jurisdiction of justices of the peace, and the introduction of com-

pulsory arbitrations. Yet, had these innovations not been made, our courts, which now labour under the share of business which remains to them, would have inevitably broken down. To this so much dreaded innovation, we are indebted for the existing laws of descent—for the improvement of our criminal code—and, in a word, for our enviable state of political, civil, and religious freedom. And should it happen that in the supervision of the law every vestige of the feudal system shall be eradicated,—every vexatious and useless distinction of action abolished, and the ensnaring technicalities of pleading and practice be removed,—we think neither the country nor the professors of the law, would have reason to complain. Again, we ask, what is to be dreaded from the revision of the law? Its rules are founded in reason, and adapted to our wants, or they are not. Of this the legislature, drawn from the people, representing the intelligence as well as the interests of the state, and required to take the most comprehensive view of their subject, is as competent to judge as any portion of the community. If the law be consistent with the public weal, it will continue unchanged; if it be not, who shall say that change will be unwise? Are we to distrust the people in their search after happiness? We hold it a maxim, demonstrated by the whole history of Anglo-America, that men enjoying the blessings of political and civil liberty, discover their best interests with the certainty of instinct. Do we dread the evils of precipitation? The work, however speedily commenced, can never be a hasty one. In its progress it will be watched with due vigilance by the sages of the law, and by hundreds of philosophical minds, already awakened to the propriety of the measure. Few important changes in principles can be anticipated, and none of these will be made without a general conviction of their necessity.

For these reasons, we regard the legislative revision of the whole Statutory and Common law, without the slightest apprehension. But there are many individuals whose opinions merit the greatest respect and consideration, who, admitting the propriety of consolidating and digesting the Statutes, discountenance any attempt at a statutory arrangement of the rules of the Common law. In deference to these individuals, we would suggest a substitute for legislative enactment, which we think may quiet every reasonable fear on this subject, and which, removing in a very great measure the uncertainty, complexity, and obscurity which now exists in our jurisprudence, would be a preparatory step to the entire codification of the law. We mean a digest of the Statute and Common

law, compiled under the auspices of the government, by one or more individuals. To this, however, the previous consolidation of the Statutes by the legislature, would be indispensable; for no recasting of the Statutory law can be safely made without express legislative sanction. The Statute law thus prepared would possess an integral and independent existence, and be admirably fitted for working into the general digest. The rules of the Common law, abstracted in the most comprehensive form, and divested of all that is foreign to our institutions, customs and manners,—in a word, of all that, though now mixed up with the law, is not law, might be arranged under appropriate heads, and the whole interwoven into a system, so far as is compatible with our peculiar institutions, on the model, familiar to the profession and the public, already given by C. Justice Hale, and improved by Sir William Blackstone. Every rule of the Common law would then rest upon the authorities cited for its support. No portion of it would be lost by omission from the compilation. The law would be as accessible, though not so certain, as if declared by the legislature; and such portions of the digest as could not be impugned, would become as authoritative upon the courts, as the clearest declaration of the public will. In the progress of a few years, omissions might be supplied, pleonisms reduced, errors detected and corrected, and the new provisions necessary to its perfection might be added; and, at length, the public mind fully reconciled to its merits, the system might be completed by the formal and direct sanction of the legislature.

The master mind of Lord Bacon has already marked out the general and proper course of labour for the execution of such a digest. His views for the present occasion may be reduced to the following short propositions:

1. Preparatory collection and arrangement of the reporters in *serie temporis*, shall be made.

From these, with the aid of the abridgments, digests, and treatises, the rules of law may be reduced with facility, under appropriate titles, and arranged in systematic order.

2. In effecting this, all cases clearly not law shall be omitted.

3. "Homonimiæ, or cases merely of iteration and repetition, are to be purged away."

4. *Antinomiæ* or contradictory cases shall be collected for legislative decision, and doubtful cases should be also submitted to the same tribunal.

5. A book *de verborum significationibus*, or of terms of the law, shall be compiled.

Upon the nature of the agency by which this great work shall be effected, whether confined to the statute law alone, or extended to the common law, there will necessarily be a diversity of opinion. We shall, with the frankness we have hitherto used in the consideration of our subject, respectfully offer our own.

We think that the direction of this work should be confided to an individual vested with power to call to his aid, as occasion shall require, all the officers of the government, and to employ the necessary subordinate agents. One mind should form the system of classification, and superintend its details. The subordinate agents, not to exceed perhaps four in number, would aid each other and their principal, in the detection of omissions and errors, in principles and phraseology.

A commission of three persons properly qualified should be appointed, to whom the several parts of the work as it progressed should be submitted. Their duty should consist in ascertaining, as it regards the statutory law, that no omissions or misstatements of the existing law have been made before the consolidated bills should be submitted for legislative enactment, and to report on the propriety of any new provisions which might be suggested, with liberty to offer to the legislature, any suggestions for the amendment of the proposed bills, but not to control the principal agent in his labours. In relation to the common law digest, and the interweaving of the common and statute law, they should also be empowered to revise the labours of the principal agent, and to submit to him such amendments as they might deem proper, before publication.

This plan, it seems to us, would ensure industry and dispatch, would preserve a responsibility in the principal agent for the prompt and correct execution of his task, and prevent those collisions of opinion which would retard the work.

Our plan of codification consists of three parts, which may be executed separately.

1. The consolidation and classification of the statute law. Should the legislature resolve to proceed no further than this, much, very much would be gained.

2. The codification of the statutes thus consolidated, and the common law, the latter to be published without legislative enactment.

3. And lastly, the reduction of the whole municipal law to statutory form, to be published and declared by the legislature, as the exclusive municipal law of the land.

OF APPRENTICES.

Minors bind themselves prentice how.

1. Be it enacted, &c. That every minor may bind himself by indenture, to serve as an apprentice, in any art, mystery, occupation, or labour, with the assent of his parents, guardian or next friend; or if a pauper, with the assent of the overseers of the poor, and two justices of the peace, or by the direction of the manager of the house of employment, for, &c. &c. (*inserting the places in which such managers are specially empowered to bind out paupers;*) and such assent and approbation shall be testified, by the party giving the same, signing such indenture. But the time of service stipulated in such indenture, shall not exceed, in the case of a female, eighteen years, and in case of a male, twenty-one years. (*Act 29th Sept.* 1770, *Sec.* 1.)

For wh term.

Consen parents when r quisite.

2. If the father of such minor be living, at the time of making such indenture, his assent, and in case of his death, the assent of the mother shall be requisite thereto, unless the parent shall have abandoned the protection of such child, or it shall have become a pauper. (1 *S. and R.* 366.)

Of gua and ne friend.

3. If the parents of the minor be dead, or have abandoned him, the assent of his guardian, or if he have no guardian, of some relation or other reputable person, acting as the next friend of the minor, shall be requisite to such indenture.* (1 *S. and R.* 366. *Roach's case, Whart. Dig.* 20.)

* It has appeared to us, from the 1 Sec. Act 27th March, 1713, constituting the Orphans' Court, that the legislature designed that the next friend of the minor, under whose care he might bind himself, should be appointed by the court. But the Supreme Court having decreed otherwise, in Roach's case, July 1821, Whart. Dig. 20. we have stated the law as in the text. The practice of using any person for the occasion, as the next friend of the minor at the making the indenture, may have its convenience, but is certainly not advantageous to the minor. Such next friend, is indispensible to the law, and to public opinion; and he rarely gives other attention to the subject than to place his name to the indenture. If he were appointed by a solemn act of the court, he would feel a responsibility for his conduct, and an interest in the welfare of the minor, which would lead to examination of the moral and professional fitness of the master, before the execution of the indenture, and to the state of the apprentice afterwards. Would not the legislature contribute to the advancement of the public morals, by requiring the "next friend" to be appointed as the guardian is, by the Orphans' Court?

Who shall not serve as such next friend.

4. But the former master of an apprentice shall not serve as his next friend, in case of binding the apprentice to another master. (1 *S. and R.* 366.)

Assent of overseers, when requisite and valid.

5. The assent of the overseers of the poor shall be requisite and valid, only in case the minor be a pauper, and be settled in the district for which such overseers are appointed; and at the binding of a pauper his signature to the indenture shall not be required.

Persons of full age may bind themselves apprentices.

6. Any person of full age may bind himself to serve as an apprentice to any trade, mystery or occupation, for any term of service: and shall be subject to the provisions of the law relating to apprentices. *Comth.* v. *St. Germains*, 1 Browne 24.

Assignment of indenture, when lawful, how made.

7. If the term of the indenture of apprenticeship, in any case, extend to assigns, the master may assign the apprentice to any person of the trade, occupation or employment mentioned in such indenture: provided the apprentice and his parent or guardian give their consent to such assignment by writing attached thereto, before some justice of the county in which the master resides, who shall give a certificate of such consent upon or annexed to such indenture. *Act* 11 *April* 1799, *Sec.* 2. *Commth.* v. *Vanlear*, 1 *S. & R.* 248. *Comth.* v. *Jones*, 1 *S. & R.* 159.

Parol assignment, effect of.

8. But the parol assignment of such indenture, though not binding upon the apprentice, shall be valid as between the assignor and assignee. *Martin* v. *Rice*, 2 *Browne* 191.

Assignment by executors, when and how made.

9. If the master shall die before the term of apprenticeship expire, his executors or administrators may in case the term of the indenture extend to then, and not otherwise, assign the remainder of such term to such person of the trade or calling mentioned in the indenture, as may be approved by the court of Quarter Sessions of the county where the master lived, and such assignee shall have the same right as the deceased master had at the time of his death. *Act* 11 *April* 1799, *Sec.* 2. *Kennedy* v. *Savage*, 2 Browne 180.

Proceeding before justice in case of misconduct on the part of master or apprentice.

10. If any master shall evilly treat, or shall not discharge his duty toward his apprentice according to the covenants of his indenture, or if any apprentice shall absent himself from his master's service without leave, or shall not discharge his duty to his master according to such covenants; the master or the apprentice aggrieved in the premises may apply to any justice of the place where such master resides, who, after having given due notice to such master or apprentice, and his neglect or refusal to appear,

shall issue his warrant for bringing such master or apprentice before him, and shall upon his appearance take such order and direction between such master and apprentice in order to their reconciliation, as the equity and justice of the case may require.*

Proceeding when justice cannot reconcile the parties

11. And if such justice cannot accommodate the difference and dispute between the master and apprentice, through a want of conformity in the master, he shall take a recognizance of such master, and bind him over to appear and answer the complaint of such apprentice at the next county court of quarter sessions, and shall take such order with respect to such apprentice as to him shall seem just; and if through want of conformity in the apprentice, he shall, if the master or apprentice request it, take a recognizance of such apprentice, with one sufficient surety, for his appearance at the said sessions, and answer the complaint of his master, or shall commit such apprentice for want of such surety to the common gaol of the said county.—*(Act of 29 Sept.* 1770, *Sec.* 2,*)* †

Power of courts of Quarter Sessions disputes between master & apprenti

12. Upon the appearance of the parties and hearing their proofs and allegations, such court may discharge such apprentice from his apprenticeship and the covenants of his indenture; or may sentence him to such punishment by imprisonment of the body and confinement at hard labour, as they may think his offence may deserve. *(Act* 29 *Sept.* 1770. *Sec.* 2.*)*

Proceedi in case prentic second f master's service.

13. If any apprentice shall abscond from his master's service, any justice of the county in which such apprentice may be, may issue his warrant to apprehend and bring such apprentice before him or some other justice of such county. And if upon hearing of the parties default be found in the apprentice, such justice shall commit him to the common gaol of the county where his master shall reside, unless he consent to return home, or shall find sufficient surety to appear at the next sessions to be holden for the county last aforesaid, to answer the complaint of the master, and not to depart from the court without leave. *(Act* 29 *Sept.* 1770. *Sec.* 3.*)*

* The words "in order to their reconciliation," are not in the Statute. It seems to us that they are necessary to the sense, as gathered from the context, and would limit and define the power of the justice, which, from the words of the act, is general and unlimited.

† The committal of the apprentice to the common jail, is a barbarity which should no longer disgrace our law. The offences of apprentices are ordinarily but gross indiscretions, and their punishment ought not to subject them to confinement in the receptacle of criminals, and to a disgrace almost indelible, which takes from them all pride of character. In the present state of our jails, confinement therein subjects the apprentice to the most dangerous immoral contagion.

Penalty for harbouring, &c. an absconding apprentice.

14. If any person harbour, conceal, or entertain such apprentice, knowing him to be such, during the space of twenty-four hours, without his master's consent, and shall not give notice thereof to such master, he shall pay to the master the sum of two dollars and sixty-six cents for every day he shall so harbour, conceal, or entertain, such apprentice, *to be recovered as debts under one hundred dollars are now recovcrable.** (*Ibid.*)

In indenture of apprenticeship may be avoided; how.

15. An indenture of apprenticeship shall be avoided, 1. By the death of the master, when the covenants do not extend to his executors or administrators. 2. By consent of the parties. 3. By order of the Court of Quarter Sessions, when, by the conduct of the master, there is danger to the mind or morals of the apprentice, or in pursuance of the power given by article 12. *Graham* v. *Graham*, 1 *S. & R.* 330—*Commonwealth* v. *St. Germains*, 1 *Browne*, 24.

In the above example, we have included the provisions, relating to apprentices, of the acts of 29th Sept. 1770; 11th April, 1799; 9th March, 1771, and 29th March, 1803; with the construction given to these acts by fifteen decided cases; and have not occupied more than half the room of the Statutes, and the abstract of these cases, in the shortest form, as given in Wharton's Digest. The reader will judge how much is gained in perspicuity and cognoscibility. We do not offer this example as a compend of the whole Statute law relative to apprentices. There are other provisions which affect them in common with other servants, and which would find their proper place in treating of the title of master and servant.

The title of master and servant in the digest we have proposed of the Statute and Common law, might be treated thus:

* The words in italics, are not in the statute, but are substituted for the following, which, by reason of the enlargement of the jurisdiction of the justices of the peace, require alteration; "to be recovered in a summary way, as debts under five pounds are by law directed to be recovered, if the same shall not exceed five pounds; if otherwise, to be recovered by action of debt, to be brought at the suit of the party injured, in any court of common pleas within this province."

TITLE L.

OF MASTER AND SERVANT.

CHAPTER I.—Of negro and mulatto servants.
Section 1.—Of slaves.
2.—Of coloured servants for years.

CHAPTER II.—Of menial servants.
Section 1.—Of hired servants.
2.—Of servants by indenture, including redemptioners, as well German as others, and adult paupers.

CHAPTER III.—Of apprentices.
Section 1.—How, and by whom, apprenticeship may be contracted.
2.—Of the means of enforcing performance of the covenants of the parties during the subsistence of the apprenticeship.
3.—Of the dissolution of the contract of apprenticeship.

CHAPTER IV.—Of the rights and liabilities of the master.
Section 1.—In relation to apprentices.
2.—In relation to other servants.

CHAPTER V.—Of the rights and duties of servants.
Section 1.—Of apprentices.
2.—Of other servants.

CHAPTER VI.—Of the remedies, by suit, of the master and servant for breach of contract.